DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 5

RIN 2900-AO13

VA Compensation and Pension Regulation Rewrite Project

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, veterans' representatives, and VA personnel in locating and understanding these regulations.

DATES: Comments must be received by VA on or before [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through http://www.regulations.gov; by mail or hand-delivery to: Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to RIN 2900-AO13. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday

through Friday (except holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Deputy Director, Office of Regulations Policy & Management (02REG), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-4902 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Introduction

The VA Office of the General Counsel provides centralized management and coordination of VA's rulemaking process through its Office of Regulation Policy and Management (ORPM). One of ORPM's major functions is to oversee VA's Regulation Rewrite Project (the Project) to improve the organization and clarity of VA's adjudication regulations, which are in current 38 CFR part 3. These regulations govern the adjudication of claims for VA's monetary benefits (compensation, pension, dependency and indemnity compensation, and burial benefits), which are administered by the Veterans Benefits Administration (VBA).

The Project responds to a recommendation made by the VA Claims Processing Task Force in its October 2001 "Report to the Secretary of Veterans Affairs" and to

criticisms by the U.S. Court of Appeals for Veterans Claims. The Task Force recommended that VA reorganize its regulations in a logical, coherent manner. The Court referred to the current regulations as a "confusing tapestry" and criticized VA for maintaining substantive rules in its Adjudication Procedures Manual (manual). Accordingly, the Project reviewed the manual to identify provisions that might be substantive and incorporated those provisions in a complete rewrite of part 3.

VA published the rewritten material in 20 Notices of Proposed Rulemaking (NPRMs) and gave interested persons 60 days to submit comments after each publication. These NPRMs addressed specific topics, programs, or groups of regulatory material organized under the following Rulemaking Identifier Numbers (RIN):

- RIN 2900-AL67, Service Requirements for Veterans (January 30, 2004)
- RIN 2900-AL70, Presumptions of Service Connection for Certain Disabilities, and Related Matters (July 27, 2004)
- RIN 2900-AL71, Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary (October 1, 2004)
- RIN 2900-AL72, Burial Benefits (April 8, 2008)
- RIN 2900-AL74, Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries (January 14, 2011)
- RIN 2900-AL76, Benefits for Certain Filipino Veterans and Survivors (June 30, 2006)
- RIN 2900-AL82, Rights and Responsibilities of Claimants and Beneficiaries (May 10, 2005)

- RIN 2900-AL83, Elections of Improved Pension; Old-Law and Section 306 Pension (December 27, 2004)
- RIN 2900-AL84, Special and Ancillary Benefits for Veterans, Dependents, and Survivors (March 9, 2007)
- RIN 2900-AL87, General Provisions (March 31, 2006)
- RIN 2900-AL88, Special Ratings (October 17, 2008)
- RIN 2900-AL89, Dependency and Indemnity Compensation Benefits (October 21, 2005)
- RIN 2900-AL94, Dependents and Survivors (September 20, 2006)
- RIN 2900-AL95, Payments to Beneficiaries Who Are Eligible for More than One Benefit (October 2, 2007)
- RIN 2900-AM01, General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings (May 22, 2007)
- RIN 2900-AM04, Improved Pension (September 26, 2007)
- RIN 2900-AM05, Matters Affecting the Receipt of Benefits (May 31, 2006)
- RIN 2900-AM06, Payments and Adjustments to Payments (October 31, 2008)
- RIN 2900-AM07, Service-Connected Disability Compensation (September 1, 2010)
- RIN 2900-AM16, VA Benefit Claims (April 14, 2008)

VA received numerous comments to the 20 NPRMs. These came from private individuals and several Veterans Service Organizations. VA thanks the commenters for

the time they invested and the contribution they have made to the quality of the proposed regulations in this document.

VA also wishes to thank its employees, past and present, for their hard work and dedication in drafting these regulations. We are especially grateful for the contributions of the late Richard Hirst and Robert M. White, who dedicated their lives to our nation's disabled veterans.

In several of the prior NPRMs, we proposed to amend certain provisions or portions of provisions in 38 CFR part 3. Upon further consideration, if VA implemented the Project as a new 38 CFR part 5, it would not amend any part 3 provisions in conjunction with publishing part 5. Instead, it would remove part 3 in its entirety when it is no longer applicable to the adjudication of benefit claims and would provide public notice before doing so.

As stated in the prior NPRMs, we would incorporate numerous statutory amendments, VA General Counsel Opinions, court decisions, and VA manual provisions in the rewritten regulations. To the extent that any manual provision would be inconsistent with a rewritten regulation, the regulation would be binding on VA and the public. Any implementation of the rewritten regulations, whether implemented as proposed in this NPRM or in some other manner, would require a corresponding rewrite of VA's adjudication procedures manual.

VA does not intend to publish a final rule in this rulemaking proceeding in the near future. In the first quarter of fiscal year 2012, VBA formulated a Transformation Plan to improve the delivery of benefits to veterans and their dependents and survivors. In the first phase of this plan, VBA's transformational people, processes, and technology initiatives are designed to achieve VA's priority goals of processing all disability claims within 125 days and increasing rating quality to 98 percent by the end of 2015. Upon achieving those goals, the plan calls for VBA to allocate resources to maintain high-quality service for compensation claims while redirecting resources to the second phase of the transformation, which will address the needs of VBA's other benefit programs (appeals, veterans and survivors pension, dependency and indemnity compensation, burial benefits, vocational rehabilitation, education, and fiduciary). To ensure that VBA successfully implements this plan and accomplishes the Department's priority goals of eliminating the disability claims backlog and improving veterans' and survivors' access to benefits and services, VA may not publish a final-rule notice in this rulemaking until VBA's Transformation implementation is complete.

In the interim, VA will continue to amend its adjudication regulations in 38 CFR part 3 to implement changes in law and the policies and procedures that it needs to properly administer its benefit programs. In amending part 3, VA may refer to the work done by the Project and may incorporate that work in whole or in part depending upon the nature of the amendments. In this way, regardless of any future decision about implementation of the Project's rewritten regulations, VA will update its regulations at

the same time that VBA is improving the delivery of benefits to veterans and survivors under the Transformation Plan.

Request for Public Comments

In this NPRM, we have merged the Rulemaking Identifier Numbers (RINs) of the 20 prior NPRMs into the RIN for this NPRM, AO13. The preamble to this NPRM addresses the public comments that VA received in response to those NPRMs and explains the changes we have made to the initially proposed rules.

Although VA does not intend to complete this rulemaking in the near future, we request public comments on the consolidation of the prior proposed rules, which would be implemented in a new 38 CFR part 5, and on the changes made to those proposed rules. Prior to publishing a final rule in this rulemaking, VA will consider any comments that it receives in response to this NPRM and will evaluate the feasibility of a one-time implementation of new part 5 as proposed. If VA determines that such an implementation is feasible, we may need to publish additional rulemakings to adapt to implementation plans and keep these proposed rules up to date.

Substantive v. Non-substantive Changes

In the NPRMs we stated:

> [a]lthough these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive differences are proposed . . . .
> . . . .

> Readers who . . . observe substantive changes between [existing regulatory provisions and proposed provisions] should consult the text that appears later in this document for an explanation of significant changes in each regulation.

In the NPRMs we sometimes referred to specific proposed changes from part 3 as "substantive" or "not substantive." Sometimes we said "we intend no substantive change." Our intent was to clarify for readers whether we were making a policy change ("substantive") or merely restating existing VA policy more clearly ("non-substantive"), in those instances where we thought a reader might need that guidance. Most often, however, we applied neither label to our changes; instead we simply told the reader how we were proposing to change a regulation provision and why.

However, the case of Roberts v. Shinseki, 23 Vet. App. 416 (2010), *aff'd on other grounds*, 647 F.3d 1334 (Fed. Cir. 2011), the U.S. Court of Appeals for Veterans Claims (CAVC) showed how such labels can be misleading. In Roberts, the CAVC affirmed VA's severance of fraudulent service connection. The Secretary argued severance for fraud is subject to the due process required in 38 CFR 3.103(b) (concerning adverse decisions) and exempt from the requirements of § 3.105(d) (concerning severance of service connection). The CAVC also held that the reference to compliance with § 3.105(d) in the regulation on protection of service-connected status § 3.957 does not apply in cases of fraud. In holding that § 3.105(d) does not apply to severance of service connection based fraud, the CAVC explicitly rejected appellant's §§ 3.105(a) and 3.957 arguments that severance for fraud requires proof that the grant was based on clear and unmistakable error (CUE).

The Roberts dissent quoted at length from NPRM AM 01, 72 FR 28770, May 22, 2007, to rebut the Secretary's assertion that his argument correctly stated VA interpretation of §§ 3.105(d) and 3.957 in light of regulatory history and in the absence of historical information that VA ever implemented the regulations differently. The dissent first noted that in rewriting §§ 3.957 and 3.105(d), "VA intends to 'clarify' and recodify 38 CFR 3.957 and the provisions of 38 CFR 3.105(d) that govern when service connection may be severed at 38 CFR 5.175, entitled 'Protection or severance of service connection.'" Id. at 436. The dissent also noted that our proposed regulations did not except severance of service connection based on fraud from the due process or burden of proof elements of §§ 3.957 or 3.105(d). Finally, the dissent noted that the NPRM stated that it explained any substantive changes between part 3 and part 5, 72 FR 28771-27772, May 22, 2007, and that there was nothing in the NPRM "indicating that the rewriting and restructuring of the regulations [pertaining to severance of service connection for fraud] are intended as substantive changes." Id. at 437-39. From these observations, the dissent reasoned, the NPRM revealed VA's interpretation of §§ 3.957 and 3.105(d) as requiring application of both the process and burden of proof provisions of § 3.105(d) before severing service connection.

This dissent illustrates the need to revise the way we use labels describing differences between part 5 regulations and the part 3 regulations from which they derive. In addition to the confusion highlighted by the Roberts case, we believe that readers may incorrectly read our substantive or non-substantive labels as referring to

the distinction that the Administrative Procedures Act (specifically 5 U.S.C. 553) makes between substantive rules and interpretive or procedural rules. See Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

To avoid potential confusion, we now advise readers to draw no inferences from the use of, or non-use of, the labels substantive or non-substantive in the NPRMs. Instead, readers should simply rely on our actual description of the change and our reasons for making the change. The only instances where we use "substantive" in this preamble are where we used the term to refute a comment asserting that we are diminishing rights or benefits and when used to distinguish a "substantive" provision from a "procedural" one.

II. Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be “Subpart A: General Provisions”. It would include information regarding the scope of the regulations in new part 5, general definitions, and general policy provisions for this part. We published this subpart as a Notice of Proposed Rulemaking (NPRM) on Mar. 31, 2006. See 71 FR 16464.

“Subpart B: Service Requirements for Veterans” would include information regarding a veteran’s military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. We published this subpart as an NPRM on Jan. 30, 2004. See 69 FR 4820

“Subpart C: Adjudicative Process, General” would inform readers about claim filing and benefit application procedures, VA’s duties, claimants’ and beneficiaries’ rights and responsibilities, general evidence requirements, and general effective dates of new awards, and about revision of decisions and protection of VA ratings. We published this subpart as three separate NPRMs due to its size. We published the first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, on May 10, 2005. See 70 FR 24680. We published the second, concerning general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, on May 22, 2007. See 72 FR 28770. We published the third, concerning rules on filing benefits claims, on April 14, 2008. See 73 FR 20136.

“Subpart D: Dependents and Survivors” would inform readers how VA determines whether a person is a dependent or a survivor for purposes of determining

eligibility for benefits. It would also provide the evidence requirements for these determinations. We published this subpart as an NPRM on September 20, 2006. See 71 FR 55052.

"Subpart E: Claims for Service Connection and Disability Compensation" would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. We published this subpart as three separate NPRMs due to its size. We published the first, concerning presumptions related to service connection, on July 27, 2004. See 69 FR 44614. We published the second, concerning special ratings, on October 17, 2008. See 73 FR 62004. We published the third, concerning service-connection and other disability compensation, on September 1, 2010. See 75 FR 53744.

"Subpart F: Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension and the effective dates governing each pension. We published this subpart as two separate NPRMs due to its size. We published the portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension on December 27,

2004. See 69 FR 77578. We published the portion concerning eligibility and entitlement requirements, as well as effective dates of Improved Pension, on September 26, 2007. See 72 FR 54776.

"Subpart G: Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary" would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; and various special rules that apply to the disposition of benefits, or proceeds of benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. We published this subpart as two separate NPRMs due to its size. We published the NPRM concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective-date rules, on October 1, 2004. See 69 FR 59072. We published the NPRM concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death on October 21, 2005. See 70 FR 61326.

"Subpart H: Special and Ancillary Benefits for Veterans, Dependents, and Survivors" would pertain to special and ancillary benefits available, including benefits for a child with various birth defects. We published this subpart as an NPRM on March 9, 2007. See 72 FR 10860.

"Subpart I: Benefits for Certain Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans and their survivors. We published this subpart as an NPRM on June 30, 2006. See 71 FR 37790.

"Subpart J: Burial Benefits" would pertain to burial allowances. We published this subpart as an NPRM on April 8, 2008. See 73 FR 19021.

"Subpart K: Matters Affecting the Receipt of Benefits" would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. We published this subpart as an NPRM on May 31, 2006. See 71 FR 31056.

"Subpart L: Payments and Adjustments to Payments" would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. We published this subpart as two separate NPRMs due to its size. We published the first, concerning payments to beneficiaries who are eligible for more than one benefit, on October 2, 2007. See 72 FR 56136. We published the second, concerning payments and adjustment to payments, on October 31, 2008. See 73 FR 65212.

The final subpart, "Subpart M: Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries" would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship. We published the NPRM, concerning apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries, on January 14, 2011. See 76 FR 2766.

III. Tables Comparing Proposed Part 5 Rules with Current Part 3 Rules

The purpose of the Regulation Rewrite Project is to reorganize all of VA's compensation and pension rules in a logical, claimant-focused, and user-friendly format. We have redistributed the part 3 regulations into a new organizational structure, part 5. We have created two tables, the distribution table and the derivation table, to facilitate the understanding of the redistribution of the regulations. These tables are meant to aid users who are familiar with either the part 3 or the part 5 regulations and are searching for their counterparts in part 5 or part 3. We have updated the tables in this NPRM to reflect the proposed changes from the 20 initial NPRMs already published.

The distribution table lists the part 3 regulations by title and matches them with the corresponding part 5 regulations. There may not be an equivalent part 5 regulation for some part 3 regulations. This is indicated by the phrase "NO PART 5 REG – unnecessary" in the part 5 column. There are several reasons not to include certain part 3 regulations in part 5. It may be obsolete or repetitive of another provision that fully covers the intent of the regulation.

The derivation table is organized by subpart. Each subpart contains regulations relevant to the title of the subpart. The derivation table lists the proposed part 5 regulations in numerical order, with the corresponding part 3 paragraph numbers and the part 5 section title. Some of the part 5 regulations have no part 3 counterpart. This is indicated by the term "new" in the part 3 column. A regulation is determined to be

"new" because it may be based on a change in law, a court decision, a General Counsel Opinion, or a manual provision.

As stated previously, there are also instances where we have not carried over a part 3 regulation into part 5. Where appropriate, we have included a comment explaining why part 5 does not include a certain part 3 provision. We propose to add part 5 citations to all the cross-references on the table to ensure that readers will be able to locate the relevant regulation.

IV. General Comments on Regulation Rewrite Project

One commenter, in response to AL70, "Presumptions of service connection for certain disabilities, and related matters", suggested that VA's decision to rewrite and reorganize the provisions of part 3 and promulgate them as part 5 is not in the best interest of veterans. The commenter stated that as part 3 has withstood the scrutiny of the courts and has been changed accordingly, there is no reason to now rewrite it. Additionally, the commenter feared that the introduction of part 5 will lead to an increase in the number of appeals to the courts as the regulations undergo the rigors of judicial review, which will result in delays to claimants.

Another commenter asserted that proposed AL83, "Elections of Improved Pension; Old-Law and Section 306 Pension", would add to the administrative costs of VA programs and therefore should not be adopted. This commenter urged VA to

provide the services already promised rather than seek “to change the manner in which they are not put forward.”

The project to rewrite and reorganize the regulations responds to a recommendation made in the October 2001 “Report to the Secretary of Veterans Affairs” by the VA Claims Processing Task Force. The Task Force recommended that the Compensation and Pension (C&P) regulations be rewritten and reorganized in order to improve VA’s claims adjudication process. These regulations are among the most difficult VA regulations for readers to understand and apply. The Project began its efforts by reviewing, reorganizing, and redrafting the regulations in 38 CFR part 3 governing the C&P programs of the Veterans Benefits Administration.

We disagree with the assertion of the commenters that rewriting and reorganizing the regulations in part 3 is not in the best interests of veterans. Although it is possible that the validity of the new part 5 regulations may be challenged in the short-term, in the long-term, rewriting and reorganizing these regulations will be beneficial to veterans. This is because part 5 will be better organized, which will allow readers and VA personnel to find information more easily. In addition, the part 5 regulations will be easier for the average reader to understand, will resolve many ambiguities and inconsistencies, and they will not include many outdated references and regulations that are found in part 3. Therefore, we propose to make no changes based on these comments.

One commenter asserted that, without legal authority, VA interprets, amends, and reverses laws enacted by Congress. The commenter stated that VA regulations obstruct compensation and "impose a separate, discriminatory, quasi-judicial process upon veterans."

We respectfully disagree with the comment and propose to make no changes based on it. Congress has given VA authority to regulate in order to carry out statutory programs supporting veterans and their families, as stated in 38 U.S.C. 501, "Rules and regulations". Paragraph (a) of section 501 includes the following:

- The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including -
    - regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
    - the forms of application by claimants under such laws;
    - the methods of making investigations and medical examinations; and
    - the manner and form of adjudications and awards.

The same commenter asserted that the Feres Doctrine (which restricts active duty servicemembers from filing suit against the U.S. Government) and the restrictions on veterans hiring attorneys to represent them in VA claims (see 38 U.S.C. 5904) are unconstitutional. The commenter also asserted that VA decisions have upheld the grant of "sovereign immunity" to the chemical companies that manufactured Agent Orange and other defoliants. Lastly, the same commenter urged that VA adopt a regulation requiring that any VA employee who wrongfully denies benefits to a veteran to be permanently removed from federal employment and lose all their retirement benefits.

We propose to make no changes based on any of these comments because they are outside the scope of this rulemaking.

V. Technical Corrections and Changes to Terminology for Part 5

We propose to make certain additional technical corrections and changes in terminology in this proposed rule.

Technical Corrections

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain technical corrections. These corrections include updated citations to certain regulations to which the NPRM referred. We are now replacing these “place holder” citations with the current part 5 citations.

Additionally, we propose to renumber certain regulations of part 5 in order to accommodate all needed regulations.

As stated previously in this preamble, we propose to eventually replace 38 CFR part 3 with a new part 5. We note that numerous 38 CFR sections reference part 3 sections. To update these citations throughout 38 CFR, we propose to add “or [insert part 5 section]” after each to include a reference to the part 5 equivalent to the referenced part 3 provision.

We have compiled the following table that lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part. As discussed in various portions of this preamble, there are instances where a part 3 regulation will not be carried over into part 5. In those instances, we propose to simply leave the part 3 citation unchanged.

Table of References to 38 CFR Part 3 Sections

This table lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part.

Part	Part Name	38 CFR Section	Part 3 Section Referenced	Equivalent Part 5 Citation
1	**General Provisions**	1.17(c)	3.311	5.269
		1.911(f)(2)	3.103(e)	5.80
		1.969(b)(1)	3.104(a)	5.160(a)
		1.969(b)(2)	3.105(a); 3.105(b)	5.162(c); 5.162(f); 5.163
		1.969(b)(3)	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83; 5.84
		1.969(c)	3.105(b)	5.163
		1.969(c)	3.400(h)	5.150(a); 5.166; 5.55(e)
4	**Schedule for Rating Disabilities**	4.3	3.102	5.249(a); 5.4(b); 5.3(b)(2); 5.3(b)(3); 5.3(b)(5);
		4.17(b)	3.321(b)(2)	5.380(c)(5)
		4.28(Note(1))	3.105(e)	5.177(f)

		4.29(a)(2)	3.105(e)	5.177(f)
		4.29(g)	3.321(b)(1)	5.280
		4.30 (introduction)	3.105(e)	5.177(f)
		4.30(a)(3)	3.105(e)	5.177(f)
		4.71a (table II) (row 2 column 2)	3.350(c)(1)(i)	5.326(a)
		4.71a (table II) (row 2 column 3)	3.350(b)	5.324
		4.71a (table II) (row 2 column 4)	3.350(f)(1)(x)	5.327(a)
		4.71a (table II) (row 2 column 5)	3.350(f)(1)(vi)	5.325(c)
		4.71a (table II) (row 2 column 6)	3.350(f)(1)(xi)	5.328(b)
		4.71a (table II) (row 2 column 7)	3.350(f)(1)(viii)	5.326(f)
		4.71a (table II) (row 3 column 3)	3.350(b)	5.324
		4.71a (table II) (row 3 column 4)	3.350(f)(1)(iii)	5.325(b)
		4.71a (table II) (row 3 column 5)	3.350(f)(1)(i)	5.325(a)
		4.71a (table II) (row 3 column 6)	3.350(f)(1)(iv)	5.326(d)
		4.71a (table II) (row 3 column 7)	3.350(f)(1)(ii)	5.326(c)
		4.71a (table II) (row 4 column 4)	3.350(d)(1)	5.328(a)
		4.71a (table II) (row 4 column 5)	3.350(c)(1)(iii)	5.326(e)
		4.71a (table II) (row 4 column 6)	3.350(f)(1)(ix)	5.327(d)
		4.71a (table II) (row 4 column 7)	3.350(f)(1)(xi)	5.328(b)
		4.71a (table II) (row 5 column 5)	3.350(c)(1)(ii)	5.326(b)
		4.71a (table II) (row 5 column 6)	3.350(f)(1)(vii)	5.327(c)
		4.71a (table II) (row 5 column 7)	3.350(f)(1)(v)	5.327(b)

		4.71a (table II) (row 6 column 6)	3.350(e)(1)(i)	5.330(a)
		4.71a (table II) (row 6 column 7)	3.350(d)(3)	5.328(d)
		4.71a (table II) (row 7 column 7)	3.350(d)(2)	5.328(c)
		4.71a Note to table II	3.350(b); 3.350(e)(2); 3.350(f)(3); 3.350(f)(4); 3.350(f)(5)	5.324; 5.330(d); 5.331(d); 5.331(e); 5.331(f)
		4.73 Note	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.73 Note after (the pelvic girdle and thigh)	3.350(a)(3)	5.323(d)(1); 5.323(d)(2)
		4.73 Note after 5327 (miscellaneous)	3.105(e)	5.177(f)
		4.73 Note after 5329 (miscellaneous)	3.105(e)	5.177(f)
		4.75(c)	3.383(a)	5.383(b)
		4.75(f)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);

		4.79 Note after 6014	3.105(e)	5.177(f)
		4.79 footnote 1 after (diseases of the eye)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.79 footnote 1 after (ratings for impairment of visual fields)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.85(f)	3.383	5.283
		4.85(g)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.87 Note after (6208)	3.105(e)	5.177(f)
		4.88b Note after (6301)	3.105(e)	5.177(f)
		4.88b Note after (6302)	3.105(e)	5.177(f)

		4.96(c)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.97 Note after (6731)	3.105(e)	5.177(f)
		4.97 Note after (6819)	3.105(e)	5.177(f)
		4.97 footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.104 Note after (7011)	3.105(e)	5.177(f)
		4.104 Note after (7016)	3.105(e)	5.177(f)
		4.104 Note after (7019)	3.105(e)	5.177(f)
		4.104 Note after (7110)	3.105(e)	5.177(f)
		4.104 Note 3 after (7111)	3.105(e)	5.177(f)
		4.104 Note after (7123)	3.105(e)	5.177(f)
		4.114 Note after (7343)	3.105(e)	5.177(f)
		4.114 Note after (7351)	3.105(e)	5.177(f)

		4.115b Note	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.115b Note after (7528)	3.105(e)	5.177(f)
		4.115b Note after (7531)	3.105(e)	5.177(f)
		4.115b footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.116 Note2	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.116 Note after (7627)	3.105(e)	5.177(f)

		4.116 footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.117 Note after (7702)	3.105(e)	5.177(f)
		4.117 Note after (7703)	3.105(e)	5.177(f)
		4.117 Note after (7709)	3.105(e)	5.177(f)
		4.117 Note after (7714)	3.321(b)(1)	5.280
		4.117 Note after (7715)	3.105(e)	5.177(f)
		4.117 Note after (7716)	3.105(e)	5.177(f)
		4.118 Note after (7818)	3.105(e)	5.177(f)
		4.118 Note after (7833)	3.105(e)	5.177(f)
		4.119 Note after (7914)	3.105(e)	5.177(f)
		4.119 Note after (7919)	3.105(e)	5.177(f)
		4.12a Note(5) after (8045)	3.114	5.152
		4.127	3.310(a)	5.246
		4.128	3.105(e)	5.177(f)
14	**Legal Services, General Counsel, and Miscellaneous Claims**	14.636(c)	3.156	5.3(b)(6); 5.55; 5.153; 5.165
		14.636(h)(1)(iii)	3.750	5.745

17	**Medical**	17.36(b)(7)	3.271; 3.272; 3.273; 3.276	5.370; 5.410(a); 5.410(c); 5.410(d); 5.410(e); 5.410(f); 5.412; 5.413; 5.414(a); 5.414(c); 5.421; 5.423(a); 5.423(b); 5.423(e); 5.706(b); 5.707(c)
		17.39(a)	3.42(c)	5.613
		17.39(b)	3.42(c)	5.613
		17.47(d)(4)	3.271; 3.272	5.370; 5.410(a); 5.410(c); 5.410(d); 5.410(e); 5.410(f); 5.411(a); 5.411(c); 5.412; 5.413; 5.706(b); 5.707(c)
		17.47(d)(5)	3.275	5.410(d); 5.411(b), 5.411(c), 5.412(a); 5.414; 5.706(b);
		17.96(a)(1)	3.1(u);3.1(w)	5.1 (Improved Pension); 5.1 (Section 306 Pension); 5.460
		17.900	3.814(c)(2); 3.815(c)(2)	5.589; 5.590
		17.900	3.815(c)(3)	5.590

		17.900	3.814(c)(1); 3.815(c); 3.815(c)(1)	5.589; 5.590
		17.901(a)	3.814; 3.815	5.589; 5.590; 5.591
		17.901(b)	3.815; 3.815(a)(2)	5.590
		17.903(a)(2)(i)	3.814	5.589; 5.591
		17.903(a)(2)(ii)	3.815	5.590; 5.591
18	**Nondiscrimination in Federally Assisted Programs of the Department of Veterans Affairs-Effectuation of Title VI of the Civil Rights Act of 1964**	Appendix B to Subpart E of part 18 (Veterans' Benefits) (Adjudication)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		Appendix B to Subpart E of part 18 (Survivors' and Dependents' Educational Assistance) (Adjudication)	3.57; 3.807(d)	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		Appendix B to Subpart E of part 18 (Survivors' and Dependents' Educational Assistance) (Adjudication) (Survivors' and Dependent's Educational Assistance Under 38 U.S.C. Chapter 35)	3.807(d)	

		Appendix B to Subpart E of part 18 (Veterans' Educational Assistance)	3.50; 3.57; 3.59	5.1 (Custody of a child); 5.201(a); 5.203(b); 5.220; 5.223; 5.225; 5.226; 5.238; 5.417; 5.435; 5.695(a)
20	**Board of Veterans' Appeals: Rules of Practice**	20.101(a)(28)	3.812(d)	5.588
		20.1502(c)(3)	3.156	5.3(b)(6); 5.55; 5.153; 5.165
		20.1502(c)(4)	3.105	5.162
		20.1503(d)	3.159(b)(1)	5.90
		20.1504(b)	3.159(c)	5.90
		20.1505	3.2600	5.161
		20.1507(a)	3.103(c); 3.2600(c)	5.82; 5.161
		20.1507(a)(2)	3.2600	5.161
		Appendix A to part 20 (20.1)	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83; 5.84
		Appendix A to part 20 (20.1105)	3.156; 3.160	5.3(b)(6); 5.55; 5.153; 5.165; 5.57(b)-(d)
		Appendix A to part 20 (20.1106)	3.22	5.520(b); 5.521; 5.522
		Appendix A to part 20 (20.1304)	3.103; 3.156; 3.160	5.3(b)(6); 5.4(a); 5.4(b); 5.55; 5.80; 5.81; 5.82; 5.83; 5.84; 5.153; 5.165; 5.57(b)-(d)
21	**Vocational Rehabilitation and Education**	21.33 Cross-Reference	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83;

				5.84
		21.42(b)(1)	3.12	5.30; 5.31(c); 5.31(e); 5.32; 5.33; 5.34(c); 5.35(b)-(d); 5.36; 5.39
		21.48(a)	3.105(d); 3.105(e)	5.83(a) 5.175(b)(1); 5.175(b)(2); 5.177(d); 5.177(f)
		21.260(d)	3.50; 3.51; 3.57; 3.59	5.1 (Custody of a child); 5.201(a); 5.203(b); 5.220; 5.223; 5.225; 5.226; 5.238; 5.417; 5.435; 5.695(a)
		21.330(a)	3.451; 3.458	5.771; 5.775
		21.330(b)	3.400(e)	5.782
		21.414(a)	3.105(a)	5.162(c); 5.162(f)
		21.414(b)	3.105(b)	5.163
		21.414(c)	3.105(c)	5.177(e)
		21.414(d)	3.105(d)	5.177(d)
		21.414(e)	3.105(e)	5.177(f)
		21.422(d)(3)	3.103(c); 3.103(d)	5.81; 5.82
		21.3021(a)(2)(ii)	3.6(a); 3.807	5.21(a); 5.586(b); 5.586(c)
		21.3021(b)	3.40(b); 3.40(c); 3.40(d); 3.807(d)	5.610

		21.3021 Cross-Reference	3.6	5.21(a); 5.22(a); 5.23; 5.24; 5.25; 5.29
		21.3021 Cross-Reference (persons included)	3.7	5.21(a); 5.23(a)-(b); 5.24(a); 5.25(a)-(b); 5.28; 5.31(c)
		21.3021 Cross-Reference (Philippine and insular forces)	3.40	5.610
		21.3023 Cross-Reference (concurrent payments)	3.707	5.764(b); 5.764(c); 5.764(d)
		21.3023 Cross-Reference (certification)	3.807	5.586(b); 5.586(c)
		21.3024 Cross-Reference	3.708	5.750; 5.751
		21.3041(e)	3.57(c)	5.223(b)
		21.3131(d)	3.40(b); 3.40(c); 3.40(d)	5.610
		21.3133(c)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.3306(b)(3)(ii)	3.102	5.3(b)(2); 5.3(b)(3); 5.3(b)(5); 5.4(b); 5.249(a)
		21.3333(c)	3.40(b); 3.40(c); 3.40(d)	5.610

		21.4003(a)	3.105(a)	5.162(c); 5.162(f)
		21.4003(b)	3.105(b)	5.163
		21.4003(c)	3.105(c)	5.177(e)
		21.4003(d)	3.105(d)	5.177(d)
		21.4007	3.900; 3.901(except paragraph (c)); 3.902(except paragraph (c)); 3.903;3.904; 3.905	5.675(a); 5.676(b) and (c); 5.677(b) and (c); 5.678(b)(3); 5.675(b); 5.1 (Fraud (1)); 5.676(a); 5.676(b)(2); 5.676(b)(1); 5.676(b)(3)(i); 5.680(c)(1); 5.680(c)(2); 5.677; 5.678; 5.676(d); 5.677(b)(3)(ii); 5.677(c)(2); 5.678(b)(3)(iv); 5.678(c)(2); 5.679; 5.680(a); 5.680(c)(3)
		21.4135(t)	3.114(b)	5.152
		21.4200(x)	3.1(i)	5.1 (State)
		21.5021(b)(5)	3.15	5.21(b); 5.39(e)
		21.5021(l)	3.1(j)	5.191
		21.5021(m)	3.1(j); 3.52	5.191; 5.200(a); 5.200(b)
		21.5021(n)(2)	3.57; 3.58	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a); 5.224(a)
		21.5021(o)	3.59	5.238
		21.5040(b)(2)(ii)	3.13(c)	5.37(d)

		21.5040(b)(3)	3.12; 3.13	5.30; 5.31(c); 5.31(e); 5.32; 5.33; 5.34(c); 5.35(b)-(d); 5.36; 5.39; 5.37(b); 5.37(c); 5.37(d)
		21.5040(c)(3)	3.15	5.21(b); 5.39(e)
		21.5040(d)(1)(ii)	3.4(b)	5.24(a); 5.24(b)
		21.5040(d)(3)	3.15	5.21(b); 5.39(e)
		21.5065(b)(5)(iv)	3.4(b)	5.24(a); 5.24(b)
		21.5065(b)(6)	3.15	5.21(b); 5.39(e)
		21.5067(c)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.5740(b)(2)(iii)	3.4(b)	5.24(a); 5.24(b)
		21.5740(b)(3)	3.15	5.21(b); 5.39(e)
		21.5742(a)(1)	3.15	5.21(b); 5.39(e)
21	**VR&E**	21.6050(a)	3.342	5.380; 5.347
		21.6050(b)	3.342	5.380; 5.347
		21.6420(d)	3.343	5.286; 5.347
		21.6501(a)	3.340; 3.341	5.284; 5.285
		21.6503(b)	3.340; 3.341	5.284; 5.285
		21.6507(a)	3.343(c)(2)	5.286
		21.6521(b)	3.343(c)(2)	5.286

		21.7020(b)(1)(iii)	3.6(b)	5.22(a); 5.22(b); 5.23(a)(1); 5.23(b)(1); 5.24(a); 5.24(b)(1); 5.25(a); 5.29(a)
		21.7020(b)(1)(iv)	3.6(b)	5.22(a); 5.22(b); 5.23(a)(1); 5.23(b)(1); 5.24(a); 5.24(b)(1); 5.25(a); 5.29(a)
		21.7020(b)(9)(ii)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.7020(b)(9)(iii)	3.59	5.238(a); 5.238(c); 5.238(e)(1) and 5.238(e)(2)(i)
		21.7042	3.15	5.21(b); 5.39(e)
		21.7044	3.15	5.21(b); 5.39(e)
		21.7080(c)(3)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.7080(c)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)

		21.7031(e) Cross-Reference	3.667	5.551(a); 5.695(b); 5.695(c); 5.695(d); 5.695(f)-(i)
		21.7135(y)	3.114(b)	5.152
		21.7140(g)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.7280(b)(2)	3.312	5.504
		21.7303(a)	3.105(a)	5.162(c); 5.162(f)
		21.7303(b)	3.105(b)	5.163
		21.7635(u)	3.114(b)	5.152
		21.7803(a)	3.105(a)	5.162(c); 5.162(f)
		21.7803(b)	3.105(b)	5.163
		21.8010(a)	3.815(c)(3)	5.590
		21.8010(a)	3.814(c)(2); 3.815(a)(2); 3.815(c)(2)	5.589; 5.590
		21.8010(a)	3.814(c)(3)	5.589
		21.8010(a)	3.814(c)(1); 3.815(c)(1)	5.589; 5.590
		21.9570(b)(3)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.9570(b)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435;

				5.695(a)
		21.9625(j)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.9635(u)	3.114(b)	5.152
		21.9680(e)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554

Changes in Terminology for Clarity or Consistency

We propose changes in terminology in this rulemaking primarily to achieve consistency throughout part 5. For example, while reviewing the NPRMs, we noted that we had used the word "termination" interchangeably with the word "discontinuance" (including variations of the two words). To ensure clarity and consistency in our part 5 regulations, we propose to use the term "discontinuance" throughout. The word "discontinuance" is more accurate because there are occasions when the benefit is not terminated, but discontinued for a period, and then resumed. Similarly, we propose to use "person" rather than "individual" in all instances where either term would apply.

According to paragraph 12.9 of the Government Printing Office Style Manual (2008), numerals rather than words are used when referring to units of measurement and time. Therefore, we propose to substitute the number for the word (for example, “1 year” instead of “one year”) throughout part 5.

Another source of ambiguity and confusion is the phrase “on or after” which is used in connection with a specific date when discussing the effective date of a regulatory provision or the date by which an event must have occurred. For example, a regulatory provision might be effective “on or after” October 1, 1982, which to some may seem to permit a choice between “on” or “after”. The simplest way to eliminate this ambiguity is to identify the day before the effective date and precede that date with the word “after”. In the above example, the regulatory provision would be effective “after September 30, 1982”. This method of stating effective dates makes our regulations easier to understand and apply.

We noted that in the NPRMs we used “VA benefits” and “benefits” inconsistently and interchangeably. We propose to define “Benefit” as “any VA payment, service, commodity, function, or status, entitlement to which is determined under this part, except as otherwise provided.” Therefore, we propose to generally not include “VA” before “benefit”. However, we propose to still use “VA benefit” when that term is needed to distinguish it from some other benefit such as a Social Security benefit or some benefit for which election is required (e.g. Radiation Exposure Compensation Act).

Removal of Death Compensation Provisions

There are less than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years and we do not expect to receive any more.

Because of the small number of beneficiaries of death compensation, there is no need to include the provisions concerning claims for death compensation in part 5. We therefore propose to remove the death compensation provisions (§§ 5.560–5.562) that were initially proposed in AL71. 69 FR 59072, Oct. 1, 2004. We propose to reserve §§ 5.560–5.562 for later use. We propose to revise § 5.0 (the scope provision for part 5), as initially proposed in AL87, 71 FR 16464, Mar. 31, 2006, to direct that any new claims for death compensation or actions concerning death compensation benefits be adjudicated under part 3. We propose to retain provisions regarding death compensation in subpart L because a death compensation beneficiary may still elect to receive dependency and indemnity compensation instead.

Removal of Spanish-American War Death Pension Provisions

There is currently one beneficiary receiving a Spanish-American War death pension. Therefore, the provisions concerning Spanish-American War death pensions should not be carried forward to part 5. Instead, we propose to remove the Spanish-American War death pension provisions initially proposed in AL83 (§§ 5.460(c) and

5.462). 69 FR 77578, Dec. 27, 2004. We propose to reserve § 5.462 for later use. In addition, we propose to change initially proposed § 5.0 (the scope provision for part 5) as proposed in AL87, 71 FR 16464, Mar. 31, 2006, to direct that any new claims or actions concerning Spanish-American War death pension benefits be adjudicated under part 3.

Change in Titles of Certain VA Officials

Effective April 11, 2011, VA reorganized its Compensation and Pension Service by dividing it into several smaller entities, including the Compensation Service and the Pension and Fiduciary Service. We propose to update these terms throughout part 5.

VI. Subpart A: General Provisions AL87

In a document published in the Federal Register on March 31, 2006, we proposed to revise Department of Veterans Affairs (VA) regulations concerning general compensation and pension provisions. See 71 FR 16464. We provided a 60-day comment period that ended May 30, 2006. We received submissions from seven commenters: Paralyzed Veterans of America, Disabled American Veterans, Disabled American Veterans Chapter 57, Vietnam Veterans of America, National Organization of Veterans' Advocates, and two members of the general public.

§ 5.0 Scope and Applicability

In the NPRM, we identified proposed § 5.0 as a new regulation in the derivation table. 71 FR 16465-16466, Mar. 31, 2006. However, initially proposed § 5.0 is derived

from § 3.2100, which governs the applicability of rules in one subpart of 38 CFR part 3. Section 5.0(a) states a similar applicability provision for all of part 5, with only minor revisions to conform it to the part 5 formatting and numbering. The derivation and distribution tables are corrected accordingly.

To provide a smooth transition from part 3 to part 5 we propose to add a new paragraph (b) to initially proposed § 5.0 establishing the applicability date for part 5. We propose two rules to govern the applicability date of part 5, and two rules to state the different situations in which part 3 would still apply. These rules would make it clear that part 5 will apply prospectively, but not retroactively.

To have part 5 apply immediately to all pending cases would require readjudication of thousands of claims (e.g. those where a decision has been rendered by the agency of original jurisdiction and the appeal period has not expired), which would significantly delay processing new claims being filed with VA. We believe that our proposed applicability structure will be the most efficient way to transition from part 3 to part 5 and is clear both to VA employees and to the members of the public who use VA regulations.

We propose to have part 3 continue to apply to all death compensation and Spanish-American War benefits. As explained in detail later in this preamble, these two benefit programs have very limited numbers of beneficiaries or potential claimants, and these claims can continue to be processed under part 3, so there is no need to include them in part 5.

To ensure that users of part 3 are aware of part 5's applicability, we propose to add a new § 3.0 to 38 CFR part 3. This section will be titled Scope and applicability and will state that part 5, not part 3, will apply to claims filed on or after the effective date of the final rule.

We note that part 5 is not a "liberalizing VA issue approved by the Secretary or at the Secretary's direction" under § 5.152 with regard to a claim that was filed while part 3 was still in effect for new claims. That is because part 5 does not apply to a claim that was filed while part 3 was still in effect for new claims. Therefore, part 5 cannot be liberalizing with respect to such a claim.

§ 5.1 General Definitions

Initially proposed § 5.1, included the following definition of the term ''agency of original jurisdiction'': "Agency of original jurisdiction means the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits." In the preamble to the AL87 NPRM, we noted that this definition differed somewhat from a definition of the same term in 38 CFR 20.3(a), which reads as follows: "Agency of original jurisdiction means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim." We stated that, "The difference is because of the narrower scope of part 5 and because the definitions in § 20.3 apply in an appellate context while the definitions in proposed § 5.1 do not."

Notwithstanding our initially proposed reason for creating a different definition, we have determined that it is unnecessary because the § 20.3(a) definition will work well in part 5. Moreover, having two different definitions, even if the two are substantially the same, could cause a reader to mistakenly believe that VA intends to define "agency of original jurisdiction" differently depending on whether a case is pending at a VA regional office or at the Board of Veterans' Appeals (the Board). We therefore propose to replace the definition from the AL87 NPRM with the § 20.3(a) definition.

In response to RIN 2900-AM05, "Matters Affecting Receipt of Benefits", we received several comments on our proposed definitions of "willful misconduct", "proximately caused", and "drugs". 71 FR 31056, May 31, 2006. Because these terms apply to several different subparts in part 5, we propose to move them to § 5.1 and will therefore discuss these comments in connection with § 5.1 below.

In proposed rulemaking RIN 2900-AM16, VA Benefit Claims, we initially proposed definitions of "application" and "claim", to be added to § 5.1, "General definitions". 73 FR 20138, Apr. 14, 2008. In that rulemaking, we proposed that, "Application means a specific form required by the Secretary that a claimant must file to apply for a benefit" and "Claim means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit."

In responding to this comment, we determined that we had used the terms “file” and “submit” interchangeably in the NPRMs. We note that other provisions in title 38 use “submit” or variants thereof with respect to the presentation of evidence. *See* proposed 38 current 38 CFR 3.103(b)(2), 3.203(c), and 20.1304. We note also that there is a reasonable basis for using “file” in relation to documents initiating claims and appeals and “submit” in relation to presentation of evidence: it appears that Congress has used the term “file” only in relation to documents that have procedural significance in terms of initiating claims or appeals. *See* 38 U.S.C. 5101(a), 7105(b), (c), and (d)(3). In referring to the presentation of evidence, Congress has used a variety of other terms, such as “submit[ ]” (38 U.S.C. 108(b)), “furnish” (sec. 5101(c)), “provide[ ]” (sec. 5103), or “present[ ]” (sec. 5108). Further, it is possible that “file” may suggest a requirement for a written submission – which is appropriate for claims, notices of disagreement, and substantive appeals – whereas “submit” would include oral presentation of evidence at a hearing. For these reasons, we propose throughout part 5 to use “file” in relation to documents initiating claims and appeals and “submit” in relation to presentation of evidence.

One commenter commented on our initially proposed definition of ‘‘claimant,’’ which stated that, ‘‘any person applying for, or filing a claim for, any benefit under the laws administered by VA”, noting that the term “claim” has a different meaning than “application”. The commenter noted that a claim does not end with the disposition of the application and that there may be subsequent administrative actions in a claim which were not initiated by any application and action by the claimant. The commenter

did not address the substance of our definitions nor did the commenter suggest any revisions. For the reasons set forth in the preamble to proposed AM16, our definitions of “application” and “claim” reflect the distinctions described by the commenter. We therefore propose to make no changes based on the comment.

One commenter objected to the scope of our definition of “claimant”, noting that Congress, in 38 U.S.C. 5100, restricted the definition of “claimant” to 38 U.S.C. chapter 51. The commenter asserted that VA should restrict its definition to 38 CFR part 5. The commenter then noted that 38 U.S.C. 7111 also uses the word “claimant” in connection with a review of a Board decision on grounds of clear and unmistakable error. The commenter asserted that, in 38 U.S.C. 7111, the person whose file is under review is not a claimant.

The first phrase of § 5.1 states that, “The following definitions apply to this part”. Although other parts of 38 CFR may adopt the definitions used in part 5 by expressly stating so, the definitions we provided in § 5.1 are restricted by this phrase to use in part 5 unless adopted in other parts. The situation described by the commenter (concerning the person whose file is being reviewed by the Board) is not related to this rule because it concerns 38 CFR part 20. As stated above, the regulation as initially proposed already restricts the application of the definition of claimant to part 5.

Based on this comment, however, we propose to narrow the definition of “claimant” to “a person applying for, or filing a claim for, any benefit under this part.”

Because § 5.1 applies only to part 5, it is beyond the scope of this section to include as a part 5 claimant a person who is seeking VA benefits under another part of title 38 CFR, such as health care. For the same reason, we propose to make similar changes to our definitions of “claim”, “beneficiary”, and “benefit”.

We propose to add the definition of “custody of a child,” which means that a person or institution is legally responsible for the welfare of a child and has the legal right to exercise parental control over the child. Such a person or institution is the “custodian” of the child. This definition is consistent with the definition of “child custody” in 38 CFR 3.57(d) and with current VA practice and usage in 38 CFR part 3.

In AM05, § 5.661(a)(3), we initially proposed to define the term “drugs” as “prescription or non-prescription medications and other substances (e.g., glue or paint), whether obtained legally or illegally.” The definition is now proposed in § 5.1. A commenter suggested an amendment to this definition. The commenter asserted that the definition should include the word "chemical" because in the commenter’s view, “chemical” abuse also causes euphoria and “chemicals” are widely abused. Our initially proposed definition used the term "other substances" to describe the chemicals discussed by the commenter. We intended our definition to include organic substances, such as hallucinogenic mushrooms, and all other substances that may be abused to cause intoxication.

In reviewing this comment, we determined that the “other substances” language of our definition may have been overly broad. For instance, it might be misconstrued to

include any substance, for example, water. In order to avoid this potential misinterpretation, we propose to modify our basic definition of drugs to read as follows: “chemical substances that affect the processes of the mind or body and that may cause intoxication or harmful effects if abused.” The language about affecting the mind or body is taken from “Dorland’s Illustrated Med. Dictionary” 575 (31st ed. 2007). We propose to add the language about intoxication or harmful effects to ensure that we exclude items which technically are chemical substances that might affect the mind or body (for example, commercially prepared prune juice), but do not cause intoxication or harmful effects. We propose to add a second sentence to incorporate important concepts already stated in the initially proposed definition: that our definition includes prescription and non-prescription drugs and includes drugs that are obtained legally or illegally.

Another AM05 commenter stated that the phrase "obtained legally or illegally" was unnecessary and contained a negative implication. The commenter recommended saying, "however obtained" instead. We used the phrase "obtained legally or illegally" because as we stated in the NPRM, this phrase is sufficiently broad to cover all the means of obtaining drugs or other substances. We used the phrase "obtained legally or illegally" to ensure that the regulation makes clear that a properly prescribed drug, obtained legally, may be abused such as to cause intoxication and thus proximately cause injury, disease, or death. We propose to make no changes based on this comment because the recommended change would not make clear that the abuse of

legally obtained drugs is also considered drug abuse constituting willful misconduct under § 5.661(c).

We do propose, however, to change "and drugs that are obtained legally or illegally" to "whether obtained legally or illegally." This makes it clearer that "legally or illegally" applies to how prescription and non-prescription drugs are obtained. The language initially proposed could be misread to mean that there are four distinct categories of drugs, prescription, non-prescription, legally obtained, and illegally obtained. "Whether obtained legally or illegally" makes it clear that there are two categories, prescription and non-prescription, either of which could be obtained legally or illegally.

We propose to define "effective the date of the last payment" as paragraph (s) in § 5.1. This term is commonly used in part 3 as "effective date of last payment", but not defined in part 3. In certain cases of reduction, suspension, or discontinuance of benefit payments, VA adjusts payments effective the date of the last payment of benefits. This means that "VA's action is effective as of the first day of a month in which it is possible to suspend, reduce, or discontinue a benefit payment without creating an overpayment." We are adding the word "the" before "date" and "last" for clarity.

One commenter noted that the definition of "fraud" depended on where in the regulations it was used. This commenter expressed the opinion that the meaning of a word in a statute is presumed to be the common law meaning unless Congress has

plainly provided otherwise. The commenter then expressed the opinion that none of the definitions of fraud presented in initially proposed § 5.1 incorporate all the common law aspects of fraud, especially the requirement for proof of fraudulent intent and the requirement for proof by clear evidence.

We first note that Congress has specifically defined "fraud" in 38 U.S.C. 6103(a) for purposes of forfeiture of benefits. We incorporated that definition in paragraph (1) of our initially proposed definition of fraud and then proposed to make it VA's "general definition" of fraud. In reviewing our definition based on this comment, we have determined that there is no need for a general definition of fraud, since the term is only used in the context of forfeiture. We therefore propose to limit the scope to instances of forfeiture.

Regarding the commenter's assertion regarding common law, we note that the five elements of common law fraud are: 1) A material misrepresentation by the defendant of a presently existing fact or past fact; 2) Knowledge or belief by the defendant of its falsity; 3) An intent that the plaintiff rely on the statement; 4) Reasonable reliance by the plaintiff; and 5) Resulting damages to the plaintiff. See 100 Am. Jur. Proof of Facts 3d section 8. The intent element of the common law definition of fraud relates to the defendant's desire for the plaintiff's reliance on the statement, while the material misrepresentation only requires that the person committing the fraud have a knowledge or belief that the statement is false.

As stated above, our proposed definition of fraud in § 5.1 now relates only to forfeiture and is consistent with the applicable statute. There is no requirement that our definitions in § 5.1 conform to the common law definition. Veterans benefits and the body of law VA applies are often very different from the common law. Moreover, the intent requirement described in the third common law element above is contained in § 5.1 in the language requiring an "intentional" misrepresentation or failure to disclose pertinent facts "for purpose of obtaining" the specified objective.

Although some State jurisdictions require "clear" or "clear and convincing" evidence of fraud in various contexts, the Supreme Court has stated that "Congress has chosen the preponderance standard when it has created substantive causes of action for fraud." Grogan v. Garner, 498 U.S. 279, 288 (1991). Congress should not be presumed to have intended a higher standard of proof where it has not specified such a standard. See id. at 286; Thomas v. Nicholson, 423 F.3d 1279, 1284 (Fed. Cir. 2005). The definitions in these rules implement statutes that do not specify a higher standard of proof, and our general rules for evaluating evidence will suffice in determinations concerning fraud. Since we already include an intent element where it is appropriate and our standards of proof are appropriate for our decisions, we propose to make no changes based on this comment.

We propose to remove the definitions for "in the waters adjacent to Mexico" and "on the borders of Mexico". Both of these phrases applied to determining entitlement to

benefits for the Mexican Border War. There are no surviving veterans of this war, so the definitions are no longer necessary.

We initially proposed to define "notice," now proposed § 5.1, as "written notice sent to a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any." In reviewing this definition to respond to a comment, we determined that limiting this definition only to written communications could create unintended problems. In Paralyzed Veterans of America v. Sec'y of Veterans Affairs, 345 F.3d 1334, 1349 (Fed. Cir. 2003), the court held that the requirement in 38 U.S.C. 5103A(b)(2) that VA "notify" a claimant of VA's inability to obtain certain evidence may be satisfied by either written or oral notice. The court noted that "[i]t is certainly not unreasonable, in our view, for VA to retain the flexibility to provide oral rather than written notice, as it is clear that under certain circumstances oral notice might be the preferred or more practicable option." In addition, there may be other situations besides those involving section 5103A(b)(2) where written notice is not practicable and that it would not be desirable to limit the definition of "notice" to only written communications. When a specific statute or regulation requires written notice, we propose to signify that in part 5 by using the term "written" in that specific context (e.g., § 5.83(b) based on § 3.103(a) and (b)).

In addition, we have determined that the use of the defined term as part of the definition is not useful to the reader. The term "notice" is more accurately defined as a

"communication," as opposed to a "notice." We, therefore, propose to define "notice" as either:

- A written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any; or
- An oral communication VA conveys to a claimant or beneficiary.

Additionally, we propose to add the definition of "payee". This term is used throughout part 5. We propose to define this term in § 5.1 as a person to whom monetary benefits are payable.

One AM05 commenter disagreed with our initially proposed definition of "proximately caused". This commenter also disagreed with including a definition of "proximate cause" in the regulation, stating that the concept has a long history and that for VA to select one definition narrows the concept, which may not work in the favor of veterans. The commenter also objected to restricting the definition to the second definition found in "Black's Law Dictionary" 213 (7th Ed. 1999).

It is necessary to define "proximately caused" because it has many definitions, as the commenter noted. Moreover, we do not believe the concept is well-known by the public. Claimants, beneficiaries, veterans' representatives, and VA employees are the primary users of regulations. It is important that we choose one definition, to ensure a common understanding of our regulations and to ensure that all users apply them the same way.

We selected the second definition of "proximately caused" from "Black's Law Dictionary" 234 (7th ed. 1999) (the same definition is used in the 8th Edition (2004) and the 9th Edition (2009)), because that definition most closely reflects the way VA and the U.S. Court of Appeals for Veterans Claims (CAVC) apply the concept. See, for example, Forshey v. West, 12 Vet. App. 71, 73-74 (1998) ("'Proximate cause' is defined as 'that which, in a natural continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.' "Black's Law Dictionary" 1225 (6th ed.1990)."). We chose not to adopt the first definition because it deals with liability and the VA system is not a tort-claims system. Congress has specified different court procedures for tort actions. We therefore propose to make no changes based on this comment.

We propose to add a definition of "psychosis" as § 5.1 because other part 5 regulations use the term. The definition is based on 38 CFR 3.384, which defines it as any of the following disorders listed in Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, of the American Psychiatric Association (DSM-IV-TR):

- Brief Psychotic Disorder;
- Delusional Disorder;
- Psychotic Disorder Due to General Medical Condition;
- Psychotic Disorder Not Otherwise Specified;
- Schizoaffective Disorder;
- Schizophrenia;
- Schizophreniform Disorder;
- Shared Psychotic Disorder; and
- Substance-Induced Psychotic Disorder.

We propose to add definitions of the terms “service-connected”, § 5.1, and “nonservice-connected” as § 5.1. Both of these definitions are identical to those in 38 U.S.C. 101(16) and (17), except that we use the term ‘‘active military service’’ in lieu of the longer term ‘‘active military, naval, or air service’’. See 69 FR 4820, Jan. 30, 2004.

We initially proposed a definition of “service medical records” in § 5.1. We now propose to change the defined term to “service treatment records”, now § 5.1. The Benefits Executive Council, co-chaired by senior VA and Department of Defense (DoD) officials, formally changed the term for a packet of medical records transferred from DoD to VA upon a servicemember’s release from active duty. Specifically, they found that VA, the reserve components, and all of the military services, used approximately 20 different phrases for what VA referred to as “service medical records”. They concluded that this inconsistent use of terminology was a contributing factor in the fragmented processing of medical records. This proposed change would implement the Benefits Executive Council’s directive.

We omitted the Canal Zone from the initially proposed definition of “State” in § 5.1, because § 3.1(i) does not include the Canal Zone in its definition of “State”. However, 38 U.S.C. 101(20) defines “State” to include “For purpose of section 2303 and chapters 34 and 35 of this title, such term also includes the Canal Zone.” To correct this omission, we propose to revise the definition of “State” in proposed § 5.1 to include the Canal Zone “for purposes of 38 U.S.C. 101(20), and 38 U.S.C. chapters 34 and 35”.

We propose to add a definition of “VA”, as § 5.1, that is consistent with current 38 CFR 1.9(b)(1) and 38 U.S.C. 101.

Regarding our initially proposed definition of “willful misconduct”, an AM05 commenter suggested revising the last sentence of initially proposed § 5.661(a)(1) from, "A mere technical violation of police regulations or other ordinances will not by itself constitute willful misconduct", to, "A mere technical violation of police regulations or any local ordinances, including those under police, city or county authority, will not by itself constitute willful misconduct." Another commenter expressed the opinion that the use of the word "other" before the word “ordinances” may be misunderstood to refer to a state's general police power to make and enforce laws. We propose to clarify the rule based on these comments for the reasons discussed below.

The definition of “ordinance” includes city or county authority. The word “ordinance” is defined as, "An authoritative law or decree; esp., a municipal regulation." “Black's Law Dictionary” 1208 (9th ed. 2009). “Municipal” is defined as, "1. Of or relating to a city, town or local government unit. 2. Of or relating to the internal government of a state or nation." Id. at 1113.

In most municipalities, the police department establishes regulations relating to parking, street usage, and other similar civil issues. The use of the phrase "police regulations" is intended to express the idea that a violation of these types of regulations will not be used as the grounds for a finding of willful misconduct. Violations of these

regulations are “civil infractions”. An “infraction” is "[a] violation, usually of a rule or local ordinance and usually not punishable by incarceration." “Black's Law Dictionary” 850 (9th ed. 2009). A civil infraction is "An act or omission that, though not a crime, is prohibited by law and is punishable." Id. Since that term is not readily understood by most of the general public, parenthetical explanations following the use of the term will clarify the meaning for most people. We propose to revise the last sentence of what was initially proposed § 5.661(a) to read, “Civil infractions (such as mere technical violation of police regulations or other ordinances) will not, by themselves, constitute willful misconduct.” We are proposing to make this change to ensure that civil infractions, while prohibited by law, do not by themselves deprive an otherwise entitled veteran to benefits. We now propose to incorporate this provision into § 5.1.

The second sentence of initially proposed § 5.661(a)(2) read: “For example, injury, disease, or death is proximately caused by willful misconduct if the act of willful misconduct results directly in injury, disease, or death that would not have occurred without the willful misconduct.” We have determined that this statement is unnecessary because § 5.1 already defines “proximately caused”, so we propose to remove the example.

One commenter expressed the opinion that a VA determination of “willful misconduct” is a quasi-criminal determination. This commenter stated that the preponderance of the evidence standard is not appropriate in adjudicating a quasi-criminal determination. The commenter asserted that the preponderance of the

evidence standard of proof for willful misconduct determinations was too low because a determination of willful misconduct essentially bars a veteran or claimant from receiving benefits based on the veteran's service. The commenter asserted that this deprived the veteran or claimants claiming entitlement based on a veteran's service of procedural due process under the Fifth Amendment to the U.S. Constitution. The commenter expressed the opinion that VA should instead establish the clear and convincing evidence standard as the standard of proof in making willful misconduct determinations. The commenter noted that the U.S. Supreme Court has stated that a principal function of establishing a standard of proof is "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington v. Texas, 441 U.S. 418, 423 (1979).

The commenter acknowledged that VA had adopted the standard of proof articulated by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in Thomas, 423 F.3d 1279. The commenter also noted that VA has the authority to adopt a different standard notwithstanding the standard adopted by the Federal Circuit, as explained by the Supreme Court in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969-70 (2005) (finding that an agency could, through publication of a regulation, adopt an interpretation of a statute that was different than the interpretation of the same statute made by a court if the statute was ambiguous and the court's interpretation was not the only permissible interpretation of the statute).

The commenter noted that the Federal Circuit found in Thomas that the statute did not contain a standard of proof and that VA had not, by regulation, imposed a standard of proof. See 423 F.3d at 1283-84. The Federal Circuit then found that the Board's and the U.S. Court of Appeals for Veterans Claims' decisions to apply the preponderance of the evidence standard were supported by their stated reasons and bases. Id. at 1284-85. The commenter noted that the Nat'l Cable & Telecomms. Ass'n Court found that even if a court has established a standard of proof as a gap-filling measure, an agency may still establish a different standard of proof to fill gaps in a statute by regulation if the agency decides that the court's determination of a standard of proof is not in accordance with the agency's policies or does not align with the agency's perception of Congressional intent.

VA does not equate administrative willful misconduct determinations with quasi-criminal proceedings and decisions. VA administrative procedures for determining entitlement to benefits are non-adversarial and pro-claimant, in contrast to criminal proceedings. Attempts to categorize the administrative entitlement decisions made by VA as quasi-criminal proceedings characterize both the claimants and the VA administrative process incorrectly. While the commenter does not fully explain what was meant by "quasi-criminal" proceedings, we note that unlike criminal proceedings, VA has no authority under these regulations to fine, imprison, or otherwise impose punishment on a claimant. VA administratively decides entitlement to benefits in accordance with the duly enacted statutes of Congress. We do not follow the procedures used in either criminal or civil courts.

A decision that a disability was the result of willful misconduct only prohibits service connection for the disability or death incurred as a result of the willful misconduct. Contrary to the commenter's assertion, a veteran or a claimant claiming entitlement based on a veteran's service does not lose entitlement to all benefits. A decision that willful misconduct caused a disability results in essentially the same consequences as a decision that an injury or disease was not incurred in service. Service connection for that disability or death is not granted. In making a determination that the disability was due to willful misconduct, the veteran or a claimant claiming entitlement based on a veteran's service is notified of the information or evidence needed to substantiate the claim, of the decision on the claim, and of their appellate rights.

Additionally, there is no violation of the Fifth Amendment through application of the preponderance of the evidence standard to willful misconduct decisions. Since the commenter merely asserted a violation of the Fifth Amendment without explaining how the use of any one particular standard of proof could violate the due process provision of the Fifth Amendment, we are unable to respond more fully to this comment and propose to make no changes based on this comment.

VA does not need to decide if the commenter's reasoning concerning adoption of a standard of proof differing from that found by the court in Thomas is correct. After reviewing the various standards of proof, we have determined that the preponderance

of the evidence standard is the appropriate standard of proof to prove willful misconduct, except as otherwise provided by statute. We provided our reasons for selecting this standard of proof in the NPRM that proposed this segment of part 5. See 71 FR 16470, Mar. 31, 2006. The preponderance of the evidence standard provides that if the evidence demonstrates that it is more likely than not that a fact is true, the fact will be considered proven. This is an appropriate standard to apply to the administrative decisions we propose to make in connection with veterans' benefits.

We propose to move the definitions of "accrued benefits", "claim for benefits pending on the date of death", and "evidence in the file on the date of death" from § 5.550 to § 5.1. A comment to RIN 2900-AL71 "Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary", raised questions concerning the initially proposed definition of "accrued benefits". Based on that comment, we made technical revisions to clarify the definition, and also made the following revisions.

The last sentence of initially proposed § 5.550(d) (definition of "[c]laim for benefits pending on the date of death") read, "[a]ny new and material evidence must have been in VA's possession on or before the date of the beneficiary's death." One commenter, responding to RIN 2900-AL71 "Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary", suggested that VA should clarify this sentence by inserting the phrase "used to reopen the claim" between the words "evidence" and "must". The commenter was concerned that the proposed language would deter a deceased beneficiary's survivor from filing existing additional evidence in support of a

claim for accrued benefits. However, because a claim for accrued benefits must be granted based on evidence in the file on the date of death, such additional evidence would not be considered in deciding the claim. Nevertheless, to avoid any potential confusion we propose to add "submitted to reopen the claim" between "evidence" and "must". We propose to use "submitted" rather than "used" because the later implies that VA will always find that the evidence was new and material.

We made additional revisions to the definition of "claim for benefits pending on the date of death" for both readability and consistency purposes. One such revision is that we replaced the initially proposed term "finally disallowed claim" with "finally denied claim" and reorganized the sentence structure with respect to new and material evidence.

§ 5.2 Terms and Usage in Part 5 Regulations

38 CFR part 3 uses both singular and plural nouns to refer to a single, regulated person. For example, § 3.750(b)(2) refers to "a veteran with 20 or more years of creditable service", while § 3.809(a) refers to "veterans with wartime service" (emphasis added). This inconsistent usage could confuse readers so we propose to use only singular nouns to refer to a particular regulated person. We propose to state in previously reserved § 5.2 that a singular noun that refers to a person is meant to encompass both the singular and plural of that noun. For example, the term "a surviving child" would apply not only to a single surviving child, but also to multiple surviving children. Where a provision is meant to apply only to a group of people (for

example, the division of benefits between a surviving spouse and children), we will indicate this by using a plural noun to refer to the regulated group of people. Similarly, we will use a plural noun when referring to a specific, identified group of people. See, for example, § 5.27, “Individuals and groups designated by the Secretary of Defense as having performed active military service.”

§ 5.3 Standards of Proof, and Comments on Definitions of Evidentiary Terms

One commenter suggested that VA should include additional definitions in § 5.1. The commenter suggested that “evidence” should be defined as “all the means by which any alleged matter of fact, the truth of which is submitted to an adjudicator, is established or disproved.” The commenter went on to state that, "Evidence includes the testimony of witnesses, introduction of records, documents, exhibits, objects, or any other probative matter offered for purpose of inducing a belief in the contention by the fact-finder” and that, “evidence is the medium of proof”. The commenter opined that defining “evidence” would assist an unrepresented claimant in understanding the term and would inform claimants that some materials he or she submitted would not be evidence (such as arguments, assertions, and speculations).

This commenter asserted that after we define “evidence”, we should define “relevant evidence” and “probative evidence”, as follows:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the matter more probable or less probable than it would be without the evidence.
> Probative evidence is evidence that tends to prove a particular proposition or to persuade a trier of fact as to the truth of an allegation.

The commenter asserted that this would enable the claimants to understand what evidence should be submitted in order for the claimants to succeed with their claims for benefits.

We propose to make no changes based on these comments. We do not believe that there is a significant need to define the referenced terms, and there is some risk that such definitions would be misinterpreted as limiting the types of items a claimant may file or that VA will consider. Except as to claims based on clear and unmistakable error, VA is required to consider all material filed. See 38 U.S.C. 5107(b) ("The Secretary shall consider all information and lay and medical evidence of record in a case"). Defining "evidence" as suggested might discourage claimants from filing arguments or other information and statements.

The dictionary definition of "evidence" is "something that furnishes proof." "Merriam-Webster's Collegiate Dictionary" 433 (11th ed. 2006). VA does not use the word in a manner different from this ordinary or natural definition: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993). This concept applies equally to regulations. Thus, it is not necessary to define words used in a regulation when the words are used in accord with their ordinary or natural meaning. The commenter's suggested definitions of "credibility", "determination", "material", "matter", "proof", and "testimony" are likewise not needed.

The suggested definitions of “relevant evidence” and “probative evidence” are also not necessary. As explained below, the definition of “competent evidence” will be helpful to claimants because VA may in individual cases inform the claimant of the need for competent medical expert evidence on some issues. However, definitions that appear to delineate other categories of evidence, such as “relevant evidence” and “probative evidence” may be confusing to claimants and appear to suggest restrictions on the types of evidence claimants may file or that VA will consider. It is generally to the claimants’ advantage to file all information and evidence they have that have potential bearing upon the issues in their claim. Introducing definitions of “relevant evidence” and “probative evidence” might create confusion and discourage claimants from filing all information and evidence that they might otherwise file.

The same commenter urged VA to adopt a certain definition of the term “probative value of evidence”, namely “the tendency, if any, of the evidence to make any fact of consequence in the determination of the matter more or less probable than it would be without the evidence.” However, the commenter did not specifically state why VA should adopt a definition of that term, but focused instead on the suggestion that VA define the distinct but related term “probative evidence”. For the same reasons that we propose not to define “probative evidence”, we propose not to define “probative value of evidence”.

This commenter also suggested we adopt a definition of the word "issue" as "a single, certain point of fact or law that is important to the resolution of a claim for veterans' benefits." The commenter noted that this word is used in 38 U.S.C. 5107(b). The commenter opined that because Congress used this word in the statute, we must define the word. The commenter similarly opined that § 5.3(b), "Proving a fact or issue", is confusing because we did not define the word "issue" in § 5.1. The commenter suggested that we used the words "issue" and "fact" as unrelated concepts. The commenter then reasoned that, since the statute did not use the word "fact", VA may not have authority to include that word in the regulations, noting the canon of "expressio unius est exclusio alterius" ("to express or include one thing implies the exclusion of the other, or of the alternative", "Black's Law Dictionary" 661 (9th ed. 2009)).

The commenter is correct that the word "issue" is used in 38 U.S.C. 5107(b), but the word is also used in other places in title 38, often with a different meaning. See, for example, 38 U.S.C. 5112(b)(6) and 5110(g). The word "issue" is used within part 5 with at least three different meanings. See, for example, §§ 5.82(d), 5.103(e), 5.133(b), and 5.152. VA's policy is to broadly interpret 38 U.S.C. 5107(b), such that the benefit of the doubt applies both to the ultimate "issue" in a case (for example, whether to award benefits) but also to individual issues of material fact (for example, whether a particular event occurred). Therefore, we propose to revise §§ 5.1 and 5.3 to refer, where appropriate, to both questions of fact and the resolution of issues.

The same commenter urged VA to adopt a definition of the term “presumption”. In § 5.260(a) of our proposed rule, “Presumptions of Service Connection for Certain Disabilities, and Related Matters”, we clearly described the meaning of the term in the veterans benefits context: “A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts)”. 69 FR 44624, July 27, 2004. We therefore propose to make no changes based on this comment.

The same commenter urged VA to adopt a definition of “rebuttal of a presumption”. Section 5.3(c), which states, “A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact”, in effect defines the term already so we decline to make any changes based on this comment.

The same commenter urged VA to adopt a definition of “weight of [the] evidence”, a term which was used in initially proposed § 5.3(b)(1) and (3). We agree that such a definition would be helpful to readers and we therefore propose to add the following definition in § 5.3(b)(1), “Weight of the evidence, means the persuasiveness of some evidence in comparison with other evidence.” “Black's Law Dictionary” 1731 (9th ed. 2009). With this addition, initially proposed paragraphs (b)(1) through (5) are redesignated as paragraphs (b)(2) through (6), respectively.

One commenter noted that 38 U.S.C. 5107(b) contains the language “approximate balance of positive and negative evidence” and that the regulation that VA

proposed to adopt to implement section 5107(b) did not attempt to give any meaning to the statutory terms “positive and negative evidence”. The commenter asserted that these two statutory terms have known “legal” meaning and that VA must define “positive evidence” and “negative evidence” in order to give full force and effect to section 5107(b).

We did not define the terms “positive evidence” and “negative evidence” in initially proposed § 5.1 because we did not use those terms in initially proposed § 5.3(b)(2), which implements section 5107(b). Instead, we described “evidence in support of” and “evidence against” a matter. This interpretation of the statute is consistent with the clear and unambiguous meaning of the statute. See, for example, Ferguson v. Principi, 273 F.3d 1072, 1076 (Fed. Cir. 2001) (holding that section 5107(b) is “unambiguous” and upholding a decision not to apply the benefit-of-the-doubt-rule to a case where “there was more credible evidence weighing against the claim than supporting the claim”). We propose to make no changes based on this comment.

In § 5.3(a), we propose to revise the first sentence of the initially proposed paragraph by adding “material to deciding a claim”. In response to various comments concerning this proposed regulation, we noted that while we had adequately stated the general standards for proving facts and resolving issues, we had not included the reason for proving a fact.

Also in initially proposed § 5.3(a), "Applicability", we stated, "This section states the general standards of proof for proving facts and for rebutting presumptions. These standards of proof apply unless specifically provided otherwise by statute or a section of this part." In reviewing the initially proposed paragraph, we have decided to clarify that "a section" means another section besides § 5.3. We therefore propose to change "a section" to "another section".

Initially proposed § 5.3(b)(1) (now § 5.3(b)(2)) stated, "Equipoise means that there is an approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact, such that it is as likely as not that the fact is true." One commenter objected to the use of the word "equipoise" in § 5.3(b). The commenter noted that this word does not appear in 38 U.S.C. 5107(b), "Claimant responsibility; benefit of the doubt". The commenter expressed the opinion that VA should remove this word and its definition and replace the word and definition with the exact language used in 38 U.S.C. 5107(b). The commenter noted that "in attempting to define the meaning of the term 'equipoise', the initially proposed regulation states that equipoise means there is an 'approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact, such that it is as likely as not that the fact is true.'" The commenter felt that by omitting the word "equipoise" and its definition, VA would avoid confusion and be consistent with the governing statute.

We propose to make no changes based on this comment. It is not necessary to use the exact language Congress used in drafting a statute in the wording of the regulations we promulgate. The Secretary has been directed by Congress to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department." 38 U.S.C. 501(a). We chose to use the word "equipoise" because as used and defined in § 5.3, it is a clear and concise term and has the same meaning as traditionally applied to the phrase used in 38 U.S.C. 5107(b), "approximate balance of positive and negative evidence". Our use of this word is consistent with the governing statute.

Another commenter asserted that our definition of "equipoise" in initially proposed § 5.3(b)(1) (now § 5.3 (b)(2)) accurately restates the third sentence of § 3.102, but fails to accurately restate the second sentence, which emphasizes and makes clear that the balances are always to be resolved in favor of the veteran. The same commenter felt that the sentence in initially proposed § 5.3(b)(2) (now § 5.3(b)(3)) that read, "However, if the evidence is in equipoise and a fact or issue would tend to disprove a claim, the matter will not be considered proven", contradicts the benefit of the doubt rule because the rule must "always be applied in favor of the veteran". We propose to clarify the statement of the benefit of the doubt rule by revising the first sentence § 5.3(b)(3) to now state, "When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor."

In reviewing initially proposed § 5.3(b)(1) (now § 5.3(b)(2)), we have determined that the phrase “such that it is as likely as not that the fact is true” might cause a reader to mistakenly believe that this is an additional requirement for triggering the “reasonable doubt” doctrine, over and above the requirement that there be an “approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact”. We therefore propose to remove the language “such that . . .” from this paragraph.

One commenter urged VA to use the current language of 38 CFR 3.102 in proposed § 5.3(b)(2). The commenter asserted that the use of the term "equipoise" in initially proposed § 5.3(b)(2) is adversarial and that the proposed rule would “restrict [veterans’] ability to put forth the best evidence and challenge the credibility [of] evidence which the VA accepts or denies.”

As discussed in the preamble to the NPRM, we are not substantively changing the provisions in current § 3.102. Instead, we are rewording and reorganizing them to make them easier for the reader to understand. We disagree that the changes described in the NPRM and in this rulemaking make these provisions adversarial, and we therefore propose to make no changes based on this comment.

Although we decline to make the changes to initially proposed § 5.3 (b)(2) (now § 5.3 (b)(3)) suggested by the commenter, in reviewing the first two sentences of that paragraph, we have determined that they can be clarified. Specifically, the initially

proposed sentences could be misread to imply that evidence can be in equipoise regarding an issue and at the same time tend to prove or disprove a claim. As stated in 38 CFR 3.102, where the evidence is in equipoise, it "does not satisfactorily prove or disprove the claim". We therefore propose to remove the potentially confusing language regarding "support" of a claim and "tend[ing] to disprove a claim", and combined the two sentences into one. The new sentence now reads, "When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor."

One commenter noted that the sentence in initially proposed § 5.3(b)(3) (now (b)(4)) lacked parallelism. We agree and propose to change the wording by adding the words "the weight of" before the words "the evidence against it."

One commenter objected to the sentence in initially proposed § 5.3(b)(5) (now § 5.3(b)(6)): "VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim." This commenter asserted that the "reasonable possibility of substantiating the claim" portion could be read by an adjudicator as requiring sufficient evidence to grant the claim. This commenter suggests adding language to ensure that the adjudicator does not equate the new and material evidence requirement to the evidence requirements needed to grant the claim.

We disagree that a VA decisionmaker would apply this sentence as requiring that the new and material evidence to reopen a claim also be sufficient to grant the claim.

To the contrary, when read in conjunction with initially proposed § 5.3 (b)(2) (now § 5.3 (b)(3)), “Benefit of the doubt rule”, this sentence makes it very clear that a lower standard of proof is applied for reopening a claim than for granting a claim. We therefore propose to make no changes based on this comment.

One commenter objected to the general format of initially proposed § 5.3(b)(5) (now § 5.3(b)(6)) because the commenter asserted that there was a lack of emphasis on the different standard of proof used to determine whether evidence is new and material. The commenter asserted that the last sentence of the paragraph should be rewritten and moved to the front of the paragraph to add emphasis to the concept that the higher standard of proof does not apply when determining if the evidence is new and material.

We agree and we propose to change the sentence to read, “The standards of proof otherwise provided in this section do not apply when determining if evidence is new and material, but do apply after the claim has been reopened.” We propose to place this sentence as the first sentence of that paragraph, now designated as § 5.3(b)(6), to add emphasis to this provision.

One commenter noted that in § 5.3(c), we stated that, “A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact.” The commenter stated that in 38 U.S.C. 1111, the evidence to rebut the presumption of sound condition when accepted and enrolled for service is specified as clear and unmistakable

evidence, a standard higher than a preponderance of evidence. The commenter recommended inserting the phrase “Except as otherwise provided” at the beginning of the section.

We agree that the standard in § 5.3(c) applies to rebutting presumptions unless an applicable statute provides a different standard, such as in the example provided by the commenter. However, we already provided for the application of different standards in § 5.3(a) by stating, “These standards of proof apply unless specifically provided otherwise by statute or a section of this part.” Since the regulations already address the point raised by the commenter, we propose to make no changes based on this comment.

Several commenters noted that under 38 U.S.C. 1113(a), a presumption can be rebutted only when “there is affirmative evidence to the contrary.” The commenters stated that the “affirmative evidence” requirement should be inserted into § 5.3(c). We disagree with the commenters. There are many statutes that govern the rebuttal of presumptions, see, for example, 38 U.S.C. 1111, 1132, and 1154(b), but the “affirmative evidence” requirement of section 1113(a) affects only presumptions related to diseases that are covered by proposed § 5.260(c). (We note that section 1113 does not affect the ALS presumption, which is also covered by § 5.260(c)). Hence, the affirmative evidence requirement appears in § 5.260(c), but not in the general rule that applies except as provided otherwise.

We agree with these assertions to the extent that we should retain the phrase "affirmative evidence" and propose to revise § 5.260(c)(2) to include the phrase "affirmative evidence". We propose to revise § 5.260(c)(2), by replacing "Any evidence . . ." with "Affirmative evidence" in the beginning of the sentence. We also note that 38 U.S.C. 1116(f) requires “affirmative evidence” to rebut the presumption of exposure to herbicides in the Republic of Vietnam and so we now propose to insert that term into § 5.262(d).

We also propose to revise § 5.3(c) by adding a second sentence after the first sentence, that states, "In rebutting a presumption under § 5.260(c)(2), affirmative evidence means evidence supporting the existence of certain facts." We have chosen this definition instead of one of the definitions recommended by the commenters because this is consistent with the definition of “affirmative” found in “Black's Law Dictionary”, 68 (9th ed. 2009).

In a related matter, comments on both RIN 2900-AL87, “General Provisions”, 71 FR 16464, Mar. 31, 2006, and on RIN 2900-AL70, “Presumptions of Service Connection for Certain Disabilities, and Related Matters”, 69 FR 44614, July 27, 2004, indicated the need for our rules to address the role of “negative” evidence, by which we mean an absence of evidence. An absence of evidence may be considered as evidence in support of, or weighing against, a claim. For example, an absence of evidence of signs or symptoms of a particular disability prior to service would support a veteran’s claim that he incurred the disability during service. On the other hand, a lack of symptoms or

complaints during service may indicate that the veteran was not disabled during service. An absence of evidence may also be used to rebut a presumption. The U.S. Court of Appeals for the Federal Circuit endorsed this view. Maxson v. Gober, 230 F.3d 1330 (2000) (holding that VA may properly consider a veteran's entire medical history, including absence of complaints, in determining whether presumption of aggravation is rebutted). This evidence is generally one of the weaker forms of evidence, but it is nevertheless important to recognize the role that it may play in certain cases, particularly where there is little evidence to support a claim. Hence, we propose to add § 5.3 (e), which states, "VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue."

One commenter expressed concern about how a VA decisionmaker would read § 5.3(d), "Quality of evidence to be considered", in conjunction with § 5.1 that defines "competent lay evidence". The commenter asserted that if he or she determined that the evidence did not fit within the definition of competent lay evidence or that lay evidence is generally not competent, he or she would be more likely to assess the evidence as adverse to the veteran.

The commenter's assumption is incorrect. Competent lay evidence may be neutral or may be favorable to the claimant. Such evidence may also be probative, depending on the claim to be adjudicated. We also do not agree that a VA decisionmaker would determine that lay evidence was generally not competent. We have provided for the determination of what makes lay evidence competent in the

definition in proposed § 5.1. A VA decisionmaker's application of these provisions will lead the adjudicator to determine what is competent lay evidence and what is not. We propose to make no changes based on this comment.

In objecting to our initially proposed definitions of "competent expert evidence" and "competent lay evidence", one commenter wrongly asserted that there are no such definitions in current VA regulations. In fact, as stated in the preamble of RIN 2900-AL87, these definitions are based on similar definitions in 38 CFR 3.159(a)(1) and (2).

The same commenter asserted that defining competent evidence would "cause the claims of veterans to be pre-judged by adjudicators and foster an adversarial climate in the claims process." The commenter urged that, "Rather, all the evidence of record in each case should be judged on its own merits, and on the merits of the case as a whole."

The commenter did not explain how our definitions of "competent expert evidence" and "competent lay evidence" have the adverse effects he predicts, and we disagree that they would have such effects. VA has applied substantially similar definitions since 2001. 38 CFR 3.159(a)(1) and (2); see 66 FR 45630, Aug. 29, 2001. These definitions have not caused any such adverse effects, and the changes we are making to the definitions in § 5.1 will not either. We therefore propose to make no changes based on this comment.

One commenter expressed concern that by changing the definitions of "competent medical evidence" to "competent expert evidence" and "competent lay evidence" we were impermissibly amending § 3.159, "Department of Veterans Affairs assistance in developing claims." The commenter expressed the concern that since these terms were originally adopted as part of that regulation, a change in the definitions would amend § 3.159 without providing public notice and the opportunity for public comment as required by 5 U.S.C. 553.

The commenter's concerns relate to the removal of part 3 when we adopt part 5. This rulemaking will not affect such a removal; nor will this rulemaking affect claims currently being adjudicated under part 3. The definitions in § 5.1 only apply to part 5, not to part 3. Hence, there is no basis for a concern that any action in this rulemaking will affect a part 3 rule.

One commenter opined that the definitions of "competent expert evidence" and "competent lay evidence" should be revised since neither definition focused on the relevance of the evidence. The commenter also asserted that neither definition correctly described "competent expert evidence" or "competent lay evidence". The commenter believed that treatises, medical or scientific articles, and other writings are not "competent expert evidence" because they are not based on the author's personal knowledge of the specific facts of the veteran's particular case.

Although we do not agree with the suggestion that treatises, medical and scientific articles, and other writings of this type may never be "competent expert evidence", the commenter raises a valid point. Treatises and similar writings may be "competent" in the sense that they state findings and opinions based on specialized training or experience and personal knowledge of the facts on which such findings and opinions are based. However, it is misleading to equate treatises and similar writings with the types of expert evidence ordinarily provided in VA benefit claims. That is because medical treatises ordinarily recite facts or opinions derived apart from a particular veteran's case and thus are not based on personal knowledge of the facts of the veteran's case. The U.S. Court of Appeals for Veterans Claims has noted that treatise evidence is often too general or speculative to provide significant evidence concerning the cause of a particular veteran's disability. See Sacks v. West, 11 Vet. App. 314, 316-17 (1998). Citing treatises as an example of competent expert evidence may mislead claimants to the belief that such treatises are the equivalent of medical opinions based on the specific facts of their case. While treatise evidence may in some situations be probative of the fact to be proved, and must always be considered by VA when presented in a case, we do not consider it helpful to cite such writings as representative examples of competent expert evidence. Thus, we propose to revise the definition as urged by the commenter by removing the reference to treatise evidence in the definition of "competent expert evidence".

We propose not to revise the definitions to include a statement concerning the relevancy of the evidence. The relevance of the evidence depends on the facts in each

case and is to be determined on a case-by-case basis by the VA employee charged with making the decision on the claim.

One commenter urged VA to define "competent evidence" in part 5 as, "evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the matter more probable or less probable than it would be without the evidence."

This suggested definition is actually more a definition of "probative evidence" than "competent evidence". In fact, this same commenter urged VA to define "probative evidence" as "evidence that tends to prove a particular proposition or to persuade a trier of fact as to the truth of an allegation." Since the suggested definition of competent evidence concerns evidence's probative value rather than its competence, we propose to make no changes based on the comment.

In our initially proposed definition of competent expert evidence, we stated, "Expert evidence is a statement or opinion based on scientific, medical, technical, or other specialized knowledge." We propose to add "all or in part" after "based" because an expert opinion may also be based on the specific facts of a case. An example of such an opinion would be a doctor's opinion that general medical principles indicate that a particular injury would not likely have been aggravated under the facts of a particular case. See Emenaker v. Peake, 551 F.3d 1332, 1335-37 (Fed. Cir. 2008).

The initial NPRM to § 5.3 explained why part 5 will not repeat the fifth sentence of § 3.102. 71 FR 16464 (Mar. 31, 2006). Section 5.3 would also not repeat the fourth sentence. It is unnecessary because, like the fifth sentence, it confusingly elaborates the idea of "approximate balance" of evidence, which 5.3(b)(2) through (5) do well without the confusing language of the fourth or fifth sentences of § 3.102.

§ 5.4 Claims Adjudication Policies

One commenter asserted that VA gives too much weight to medical exam reports prepared by VA doctors and insufficient weight to medical exam reports prepared by a veteran's own doctors. The commenter cited the example of VA giving more weight to the report of a VA doctor who examined him for less than an hour than to the medical records from his treating doctor covering a period of over 5 years. The commenter asserted that VA's over-reliance on its own medical exams is "VA policy" but is not "sound medical practice". The commenter further asserted that when a VA medical exam is "poorly conducted and documented", VA orders a second exam rather than rely on the treating doctor's records to decide the claim. The commenter urged VA to "establish a level of proof which meets the balance test of both patient history and proof of medical condition" and not rely on "an arbitrary, 'snapshot' exam conducted in a VA hospital meaning more than years of records from the veteran's regular physician(s)."

We decline to make any changes based on this comment in the manner in which VA weighs medical evidence. VA often gives significant weight to an examination conducted, or a medical opinion provided by, a VA health care provider because they

follow set procedures designed to elicit information relevant to the particular claim. However, as stated in 38 CFR 3.326(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.” Under 38 U.S.C. 5103A(d), VA must provide a medical examination or medical opinion in all disability claims when it is “necessary to make a decision on the claim”. Under this duty, VA regularly conducts specialized medical examinations of veterans’ disabilities and often requests medical opinions on specific questions. If VA’s adjudicator finds that such an exam or opinion is inadequate, he or she returns the case to the health-care provider and requests for an adequate one to be provided.

However, VA must also “consider all information and lay and medical evidence of record in a case”. 38 U.S.C. 5107(b). Another statute requires the Board of Veterans’ Appeals to review appeals to the Secretary “based on the entire record in the proceeding and upon consideration of all evidence and material of record.” 38 U.S.C. 7104(a). This statute indicates that evidence is an element of a person’s entire VA record. The statute prescribing that VA considers the “places, types, and circumstances” of a veteran’s service when deciding a claim for service connection prescribes that VA consider “all pertinent lay and medical evidence”. 38 U.S.C. 5104(a). Although section 5104(a) could be interpreted to distinguish evidence from other documents in the record, VA regulations demonstrate that our actual practice is to review the entire record in every claim. The regulation implementing the benefit of the doubt rule of 38 U.S.C. 5107(b) provides for “careful consideration of all procurable and

assembled data" and of "the entire, complete record". 38 CFR 3.102. Therefore, in addition to considering VA medical exams and opinions, VA weighs and considers all other medical evidence, including that produced by a veteran's treating physician.

We note that 38 CFR 3.303(a) only prescribes that VA decide claims for service connection "based on review of the entire evidence of record" and there is no rule in part 3 that specifically implements 38 U.S.C. 5107(b). We therefore propose to add a new sentence at the beginning of § 5.4(b) stating, "VA will base its decisions on a review of the entire record." We use the term "entire record" because it is unclear whether "entire evidence of record" means all of the evidence of record, or the entire record. The evidence in a VA claims file is only part of the entire record comprising the claims file. Our language resolves the ambiguity in favor of the more inclusive meaning, which is consistent with current VA practice. Because § 5.4(b) would clearly state that "VA will base its decisions on a review of the entire record", we believe it would be redundant and possibly confusing to restate this principle in specific sections in part 5 (as does part 3). We therefore propose to remove such provisions from §§ 5.269(e), (f)(1) and (2), and 5.343. In order to incorporate the court's holding in Bell v. Derwinski, 2 Vet. App. 611 (1992), we propose to add the phrase "including material pertaining to the claimant or decedent, in a death benefit claim, that is within VA's possession and could reasonably be expected to be a part of the record" to the end of that sentence.

§ 5.5 Delegations of Authority

We propose to add § 5.5, "Delegations of authority", to this initially proposed segment. This regulation was inadvertently not included in the initially proposed rule. These provisions are the same as § 3.100, "Delegations of authority", reorganized to make them easier to read. We also propose to replace the § 3.100(a) language, ". . . 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 . . ." with "entitlement to benefits under part 5". We propose to make this change because part 5, like part 3, includes benefits which do not involve monetary payments. These include a grant of service connection for a veteran's disability rated 0 percent and certification of loan guaranty benefits for a surviving spouse. Lastly, we propose to omit the reference to the "Compensation and Pension Service" (used in § 3.100(a) and now subdivided into the "Compensation Service" and "Pension and Fiduciary Service") is a subdivision of the Veterans Benefits Administration, and the reference is therefore unnecessary.

VII. Subpart B: Service Requirements for Veterans AL67

In a document published in the Federal Register on January 30, 2004, we proposed to amend VA regulations governing service requirements for veterans, to be published in a new 38 CFR part 5. See 69 FR 4820. The title of this proposed rulemaking was, "Service Requirements for Veterans" (RIN 2900-AL67). We provided a 60-day comment period that ended on March 30, 2004. We received submissions from

four commenters: Disabled American Veterans, Vietnam Veterans of America, and two members of the general public.

§ 5.20 Dates of Periods of War

One commenter expressed satisfaction with the progress of the Regulation Rewrite Project and offered praise for proposed RIN 2900-AL67. The commenter was pleased with the inclusion of the Mexican Border Period in proposed § 5.20, "Dates of periods of war", as there are veterans and dependents who may still be alive and eligible for benefits based on military service during this period.

While we appreciate the commenter's concern, because there are no veterans or surviving spouses of the Mexican Border Period on VA's compensation and pension rolls and only one surviving dependent (a child), we propose to delete the provisions related to this period of war and refer regulation users to the applicable statutory provisions concerning this earlier period of war. This deletion would not affect benefit entitlement in any way. Should the occasion arise, VA will adjudicate any new claim using the statutory definition of this earlier period of war. See 38 U.S.C. 101(30).

The table in § 5.20 was published as a proposed rule using the terms "armed forces" and "active military, naval, or air service". For consistency, we propose to capitalize "Armed Forces" and change "active military, naval, or air service" to "active military service".

§ 5.22 Service VA Recognizes as Active Duty

In our NPRM, we invited comments on "whether, and to what extent, VA should recognize military duty for special work as active duty for VA purposes." 69 FR 4822, Jan. 30, 2004. One of the commenters urged that VA recognize active duty for special work. Subsequent to that publication, however, additional issues have arisen which require closer coordination than we previously anticipated between VA and the Department of Defense. When that coordination has been completed, we will publish a separate NPRM on the characterization of active duty for special work. Hence, we propose not to revise § 5.22 to address the recognition of active duty for special work.

§ 5.24 How VA Classifies Duty Performed by Armed Services Academy Cadets and Midshipmen, Attendees at the Preparatory Schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps Members

Current 38 CFR 3.6(c)(4) refers to "deaths and disabilities resulting from diseases or injuries incurred or aggravated after September 30, 1982, and . . . deaths and disabilities resulting from diseases or injuries incurred or aggravated before October 1, 1982". In initially proposed § 5.24(c)(1) (based on § 3.6(c)(4)), we proposed to replace the phrase "incurred or aggravated" with the term "that occurred". Although it was not our intention, the use of "occurred" could be construed as narrowing the scope of the regulation by excluding aggravation. Therefore, we now propose to replace "that occurred" with "incurred or aggravated" in § 5.24(c)(1).

§ 5.27 Individuals and Groups that Qualify as Having Performed Active Military Service for purposes of VA Benefits Based on Designation by the Secretary of Defense

The official names of groups of civilians who, pursuant to section 401 of Public Law 95-202, have been designated by the Secretary of Defense as having performed active military service for VA benefit purposes are listed alphabetically in proposed § 5.27(b).

Such groups apply for status as having performed active military service using group names that, as nearly as possible, precisely identify the members of the group and the service they want recognized. In fact, when a favorable determination is made, the Secretary's Federal Register notice is almost always phrased in terms of "service of the group known as", followed by the group's official name.

In the NPRM, we initially proposed to revise some of the group names for clarity and readability. However, we have determined that this could cause confusion that a group other than the original was determined to have performed active military service. Such confusion can be avoided by strictly adhering to the official names of the groups, and we now propose to revise § 5.27(b) to reflect the original group names exactly as they were provided to VA by the Secretary of Defense.

§ 5.28 Other Groups Designated as Having Performed Active Military Service

In reviewing initially proposed § 5.28, we determined that we mistitled it. This section refers only to groups, not individuals and we have retitled it accordingly.

§ 5.31 Statutory Bars to VA Benefits

In initially proposed § 5.31(c)(4), we defined the acronym “AWOL” as “absence without official leave”. However, in the Uniform Code of Military Justice (10 U.S.C. 886) that particular offense is called “absence without leave”, and the word “official” is not used. Therefore, for purposes of consistency and clarity, we propose to delete the word “official” from § 5.31(c)(4).

§ 5.39 Minimum Active Duty Service Requirement for VA Benefits

Initially proposed § 5.39(c)(2) stated, “If it appears that the length of service requirement may not be met, VA will request a complete statement of service to determine if there are any periods of active military service that are required to be excluded under paragraph (e) of this section.” After reviewing this paragraph to respond to a public comment, we propose to correct a typographical error (by changing the reference to paragraph “(e)” to “(d)”) and to clarify the paragraph to improve readability.

In § 5.39(d)(4), we initially proposed to exclude any person who has a compensable disability under 38 U.S.C. chapter 11 from the minimum active duty requirement. A disability is compensable if VA rates it as 10 percent or more disabling according to the Schedule for Rating Disabilities in part 4 of this chapter. One commenter asserted that it would be wrong to discontinue the entitlement of a veteran who did not meet the minimum active duty requirements, but was awarded an initial

temporary 100 percent rating under 38 CFR 4.29 or 4.30, which was subsequently reduced to a noncompensable (0 percent) rating. Likewise, any veteran lacking the minimum active duty requirements who had a compensable disability, but a subsequent decision reduced the rating to 0 percent, should not lose entitlement. This commenter agreed that disability ratings should fluctuate with the severity of the disability, but that eligibility, once established, should not be revoked in such cases.

Under 38 U.S.C. 5303A(b)(1), a person who initially enters service after September 7, 1980, must be discharged or released after completing 24 months of continuous active duty or the full period for which such person was called to active duty to be eligible for, or be entitled to, any benefit administered by VA based upon the length of active duty service. Section 5303A(b)(3)(C) excludes those persons from the minimum active duty service requirements who have a disability that the Secretary has determined to be compensable under chapter 11 of this title. Section 5.39(d)(4) clarifies the term “compensable” to include veterans receiving special monthly compensation under 38 CFR 3.350, as well as those receiving a 10 percent rating for multiple 0 percent disabilities under 38 CFR 3.324.

The commenter’s position appears to be that once service connection has been established and a disability rating of 10 percent or more disabling has been assigned, a person is forever excluded from having to satisfy the minimum active duty service requirements. We cannot agree.

Under 38 U.S.C. 5303A, the minimum active duty service requirements must be satisfied in order for a person discharged or released from a period of active duty to be eligible for, or entitled to, any benefit based on that period of active duty, unless a person is a member of one of the excluded groups. Under section 5303A(b)(3)(C), a person "who has a disability that the Secretary has determined to be compensable under chapter 11 of this title" meets the minimum active duty service requirement. The statute uses the present tense, "has" when referring to that disability, which means the veteran trying to show that he or she qualifies under section 5303A(b)(3)(C) must currently have a compensable disability. We also note that the current regulation on this point, § 3.12a(d)(3), already requires a current compensable disability to qualify for this exclusion. Section 5.39 does not, in any way, change the scope of this exclusion. For these reasons, we propose not to make any changes on minimum active duty service requirements based on this comment.

Upon reviewing § 5.39(d)(4) in relation to this comment, we determined that it was appropriate to clarify the regulation consistent with the above discussion. We therefore propose to replace the phrase "VA determines to be" with "is currently" in this paragraph. This will ensure that readers understand that the regulation requires that a person have a currently compensable disability to qualify for the paragraph (d)(4) exclusion.

One commenter contended that 38 U.S.C. 5303A pertains only to those persons who are veterans by virtue of having served on active duty. This commenter asserted

that a person, who obtained veteran status because an injury or disease was incurred or aggravated during active duty for training, or because an injury was incurred or aggravated during inactive duty training, is exempt from the provisions of section 5303A. The commenter alleged that the initially proposed rule does not clarify that these persons are not required to have a compensable disability to qualify for general benefits under title 38.

Upon a closer review of section 5303A and the definitions in 38 U.S.C. 101, we agree with the commenter. To be a veteran, a person must have "active military, naval, or air service", referred to in part 5 as "active military service". There are three types of service that qualify as active military service: (1) Service on active duty, (2) Service on active duty for training during which an injury or disease is incurred or aggravated, or (3) Service on inactive duty training during which an injury is incurred or aggravated, or during which the person suffers an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident. See 38 U.S.C. 101(24). Since section 5303A, by its terms, applies only to veterans who served on active duty, it does not apply to veterans who performed active military service under the provisions of § 5.21(a)(4) or (5). We therefore propose to revise initially proposed § 5.39(d) to add two other categories of persons excluded from the minimum active duty service requirements: Persons who performed active military service under the provisions of § 5.21(a)(4) or (5).

In reviewing initially proposed § 5.39 in relation to the comment discussed above, we discovered that we inadvertently omitted a phrase contained in current § 3.12a(b):

"based on that period of active service". To correct that omission, we propose to revise § 5.39(a) accordingly.

In initially proposed § 5.39, we included proposed paragraphs (f)(2)(iv) and (v). Based on our review of the proposed rule, we noted that this was a numbering error. Proposed paragraphs (f)(2)(iv) and (v) should have been numbered (f)(2)(iii) and (iv) respectively because the proposed regulation did not have a paragraph (f)(2)(iii). Instead, it mistakenly skipped from (f)(2)(ii) to (f)(2)(iv). We propose to correct this error.

Comments Outside the Scope of RIN 2900-AL67

One person commented with reference to RIN 2900-AL67. The comments related to the definition of "Service in the Republic of Vietnam", and to the so-called Bluewater sailors. These comments are outside the scope of the proposed rule published under RIN 2900-AL67, but relate to another NPRM, RIN 2900-AL70. We discussed these comments together with the other comments received in connection with RIN 2900-AL70.

We also received a comment that was not directed at any particular proposed rule, but we thought it would be most appropriately addressed in this portion of the proposed rule. The commenter was concerned that National Guard full time active duty members were not considered veterans unless they were injured on duty.

The commenter is correct. Persons who serve full time in the National Guard under section 316, 502, 503, 504, or 505 of title 32 are on active duty for training and are not considered veterans under title 38, VA's controlling statutes, unless they are disabled by an injury or disease that was incurred or aggravated during such duty. If the law is clear and unambiguous, VA is bound by it. Congress has spoken clearly about who may be considered a veteran for VA purposes. See 38 U.S.C. 101(2) and (24). Under such circumstances, the commenter's only remedy would be a change of statutory law. No change in regulations can be made based on this comment.

Changes in terminology for clarity and/or consistency

For the convenience of readers and for economy of language, we propose to spell out the full name of each VA program or benefit the first time we use it in any part 5 regulation, and to abbreviate it thereafter. For example, the death benefit payable to a surviving spouse, child, or dependent parent based on death in service or due to a service-connected disability is officially titled "dependency and indemnity compensation". That benefit name is quite cumbersome when it is repeated several times within a regulation. The abbreviation or acronym "DIC" is much easier to use and improves the readability of a regulation. In order to use the acronym, we must first spell it out for the reader, and while we do not want to spell out the term every time we use it, neither do we want to spell it out once in part 5 or once in each subpart and force the reader to keep referring back to a definition that is remote from where the acronym is being used. To strike a balance we propose to spell out the official program name followed by the acronym in parentheses the first time the program name is encountered

in a section and to use the acronym throughout the remainder of that section. This will apply to regulatory text only, and not to section titles. If we use the program title only once in a section, we would spell it out with no parenthetical abbreviation or acronym. We will apply this convention throughout part 5.

Lastly, we propose to standardize the words used in referring to VA's rating schedule, "the Schedule for Rating Disabilities in part 4 of this chapter". For this subpart, the new term will replace the initially proposed language in § 5.39(d)(4)(i).

VIII. Subpart C: Adjudicative Process, General

VA Benefit Claims AM16

In a document published in the Federal Register on April 14, 2008, we proposed to revise VA regulations governing benefit claims. 73 FR 20136. We provided a 60-day comment period that ended June 13, 2008. We received submissions from two commenters: Center for Plain Language and a member of the general public.

One commenter criticized our use of the passive voice and overly long sentences in the initially proposed rulemaking. Based on this comment, we propose to revise all of the proposed regulations to use the active voice and shorter sentences whenever possible or appropriate.

In addition to the specific changes discussed below, we propose to revise the regulations proposed in NPRM, RIN 2900-AM16 to help improve clarity and consistency with other part 5 regulations.

§ 5.50 Applications VA Furnishes

Initially proposed § 5.50(a) stated, "Upon request in person or in writing, VA will furnish the appropriate application to a person claiming or applying for, or expressing intent to claim or apply for, benefits under the laws administered by VA." Based on our review, we propose to remove "in person or in writing" because it is too restrictive. Claimants may also request applications using the telephone or e-mail. We also propose to remove the phrases "or applying for" and "or apply for" because these phrases are redundant of "claiming" and "claim". Moreover, they may cause a reader to mistakenly believe that we mean something different by the use of these different phrases.

We have defined "notice" in § 5.1. The definition applies to VA's duty to inform a claimant of something a certain way. We propose to revise the first sentence of proposed paragraph § 5.50(b) by replacing the word "notice" with "information" because use of "notice," as so defined, would be inappropriate.

The term "dependent" as used in the initially proposed rule and in § 3.150 from which it derives referred to persons known to VA as the deceased veteran's dependents at the time of his or her death. The term "survivor" better meets the requirement to

provide an application to persons with “apparent entitlement”, because it encompasses persons not known to VA as the veteran’s dependent who could, nevertheless, be entitled to a death benefit. We therefore propose to revise initially proposed paragraph (b) by replacing the word “dependent” with the word “survivor”.

We also propose to revise paragraph (b) by replacing the word “forward” in the first sentence with “furnish” and replacing “for execution by or on behalf of” with “to”. As revised, the sentence states that, “VA will furnish the appropriate application to any survivor”. “Furnish” is a more accurate word for supplying the survivor an application and it is consistent with paragraph (a), which also uses the word “furnish”. The initially proposed rule stated that VA will forward the application “for execution by or on behalf of” a dependent. In this regulation, it is surplus to state that the application is “for execution”. Although VA provides applications so claimants can execute them, the rules about what to do with an application are more appropriate to the regulations about filing claims. In the same sentence, we have changed the general reference to “such benefits” to name the benefits that a dependent could possibly receive, for example, death pension or dependency and indemnity compensation.

Additionally, we propose to revise the phrase, “If it is not indicated”, which appeared at the beginning of the second sentence of the initially proposed rule, to read, “If the available evidence does not indicate”. This phrase more clearly states what records VA will review to determine if there is a potential accrued benefits claimant. In the same sentence, we have replaced “forward” with “furnish” for the reasons discussed

above. We also propose to revise the last sentence of paragraph (b) to specifically describe the 1-year time limit for filing a claim for accrued benefits because it will be helpful to claimants.

In the NPRM, paragraph (c) implied that VA would not assist in a claim for disability or death due to hospital treatment, medical or surgical treatment, examination, or training. The initially proposed rule stated, in pertinent part, "VA will not forward an application for benefits under 38 U.S.C. 1151." We believe that it is important to instead inform the reader that VA does not have an application for claims under 38 U.S.C. 1151. We therefore propose to revise paragraph (c) to clarify that a claimant may apply in any written form for disability or death benefits due to hospital treatment, medical or surgical treatment, examination, or training under the provisions of 38 U.S.C. 1151. VA does not have an application for such a claim. See § 5.53, Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation, for the requirements for filing a claim pursuant to 38 U.S.C. 1151.

Initially proposed § 5.50 repeated the cross reference to § 3.109(b) from the end of § 3.150. This cross reference is erroneous because § 3.109(b) does not apply to any deadlines for filing claims referenced in §§ 3.150 or 5.50. We therefore propose to remove this cross reference from § 5.50.

§ 5.51 Filing a Claim for Disability Benefits

Initially proposed § 5.51(a) stated, “An individual must file a specific claim in the form prescribed by the Secretary in order for disability benefits to be paid under the laws administered by VA.” We propose to replace the phrase “in order for disability benefits to be paid under the laws administered by VA” with “for VA to grant a claim for disability benefits”. This change clarifies that the provision applies not only to cases where VA grants monetary benefits, but also to cases where VA grants service connection and rates the disabilities as 0 percent disabling.

Subsequent to the publication of proposed § 5.51, section 502 of Public Law 112-154 (2012) amended 38 U.S.C. 5101 by adding a new paragraph which states that if an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed under paragraph (1) for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form. . . The term `mentally incompetent' with respect to an individual means that the individual lacks the mental capacity—(A) to provide substantially accurate information needed to complete a form; or (B) to certify that the statements made on a form are true and complete. We propose to update § 5.51(a) to reflect this amendment.

§ 5.52 Filing a Claim for Death Benefits

Initially proposed § 5.52(a) stated, “An individual must file a specific claim in the form prescribed by the Secretary (or jointly with the Commissioner of Social Security, as

prescribed by § 5.131(a)) in order for death benefits to be paid under the laws administered by VA." Subsequent to the publication of proposed § 5.52, section 503 of Public Law 112-154 (2012) amended 38 U.S.C. 5105 by removing the requirement that the Secretary of Veterans Affairs and the Commissioner of Social Security jointly prescribe forms for use by survivors of members and former members of the uniformed services in filing application for benefits under chapter 13 of title 38 and title II of the Social Security Act. Section 503 also removed the requirement that each such form request information sufficient to constitute an application for benefits under both laws. Finally, section 503 also removed the requirement that such a claim be filed on a particular form by allowing it to be filed "on any document indicating an intent to apply for survivor benefits''. We proposed to include these statutory changes in § 5.52(a).

In response to the Center for Plain Language's comment about sentence length in initially proposed § 5.52, we propose to revise the regulation to be more concise. We propose to revise initially proposed paragraph (a) by changing "in the form prescribed" to "for death benefits by completing and filing the application prescribed". See § 5.1, "Definitions"; compare definition of "application", with definition of "claim", § 5.1(k). The requirement to use a prescribed application to claim a death benefit is consistent with the authorizing statute, 38 U.S.C. 5101(a), and its current implementing regulation, § 3.152(a). Both statute and regulation incorporate by reference the requirement that the Secretary and the Commissioner of Social Security jointly prescribe an application for use at either agency to apply for certain benefits, and that the application constitutes

a claim for both agency's benefits when filed with either agency. See 38 U.S.C. 5105; 38 CFR 3.153.

In Fleshman v. West, 138 F.3d 1429, 1431 (Fed. Cir. 1998), involving a claim for disability compensation, the Federal Circuit addressed whether the phrase "in the form" in section 5101(a) means "on a form". The court distinguished between the phrases, citing § 3.153 pertaining to claims for death benefits as an example of a regulation that clearly requires the claimant to use a specific application by using the phrase "on a form prescribed". Section 5.52(a) will implement the court's reasoning and make explicit VA's practice regarding claims for death benefits. The proposed change of language from "in the form prescribed" to "by completing and filing the application prescribed" is a clarifying change from § 3.152(a). We also propose to change the language in initially proposed paragraph (a) of § 5.52 from, "in order for death benefits to be paid under the laws administered by VA", to, "for VA to grant death benefits", to be consistent with § 5.51.

We propose to revise paragraph (b) by removing references to filing a claim for death compensation. This benefit is not available for new applicants, so it is not necessary to include death compensation provisions in part 5. As a result of this change, we propose to eliminate initially proposed (b)(1) and redesignate proposed (b)(2) and (3) as (b)(1) and (2), respectively. We propose to revise paragraph (b) to eliminate needless repetition of language common to initially proposed § 5.52(b)(2) and (3).

In initially proposed § 5.52(c)(4) and (5), we addressed the effective dates of a child's death benefits. These paragraphs referenced the claimant's requirement to timely submit evidence that VA requests and the consequence of failure to timely submit such evidence. The rules on timely submission of evidence are in § 5.136, "Abandoned claims", derived from current § 3.158. We propose to remove these provisions from initially proposed § 5.52 because there is no need to repeat them. To make the regulations more concise and easier to use, we propose to combine the remaining portions of initially proposed paragraphs (c)(4) and (5) with paragraph (c)(3) and to cross reference the effective date rules by referencing § 5.696 in paragraph (c)(1) and referencing §§ 5.538 and 5.431 in paragraph (c)(3).

§ 5.53 Claims for Benefits Under 38 U.S.C. 1151 for Disability or Death Due to VA Treatment or Vocational Rehabilitation

We propose to remove the last sentence of initially proposed § 5.53, which stated, "Such communication may be contained in a formal claim for pension, disability compensation, or DIC, or in any other document." The first sentence of the regulation states that VA may accept "any communication in writing" as a claim for benefits under 38 U.S.C. 1151. In light of that rule, the sentence we propose to remove is surplus; "any communication in writing" inherently includes one "contained in a formal claim".

§ 5.54 Informal Claims

We propose to make several changes to initially proposed § 5.54. These changes will revise and reorganize the rule to be clearer and consistent with current VA practice.

Paragraph (a) defines an informal claim and states that the informal claim must be written. VA defines a "claim" as a "formal or informal communication in writing" (§ 5.1). Section 5.54(a) merely reiterates this requirement for clarity in the rule governing informal claims. See Rodriguez v. West, 189 F.3d 1351, 1354 (Fed.Cir. 1999) (VA defines "claim" as a formal or informal written communication, therefore "under the Department's regulations an informal claim application must be written"). We also propose to add a cross reference in proposed paragraph (c)(2) to § 5.56, "Report of examination, treatment, or hospitalization as a claim." The reader should find it convenient to have a reference here to an alternative method of claiming certain benefits.

Initially proposed paragraph (a) also stated that "[a]ny communication or action" may be an informal claim for benefits. As the phrase is used in current § 3.155 from which it derives, any "action" that would be a claim for benefits would be a communication. Therefore, we propose to remove the phrase "or action" as superfluous.

Additionally, initially proposed paragraph (a) listed who may file an informal claim and stated certain conditions for persons other than the claimant to file the claim. We

propose to move this list to paragraph (b) to distinguish the authority to file an informal claim from the required content of an informal claim. Readers should find it convenient to have in one place a list of persons who can file a claim and any conditions on that authority. Initially proposed paragraph (b), like 38 CFR 3.155(b), listed several types of representatives: agents, attorneys, and service organizations. Initially proposed paragraph (a) contained the term "authorized representative", which we have moved into paragraph (b). Because "authorized representative" includes agents, attorneys, and service organizations, we propose to remove those terms from § 5.54.

Initially proposed paragraph (a) provided that a "duly authorized representative" may file a claimant's informal claim. We propose to remove the word "duly" from the phrase "duly authorized representative". It is a superfluous legalism. A claimant has or has not authorized a representative. There is no such thing as an unduly authorized representative. Such a representative would simply not be authorized.

Initially proposed paragraph (b), like current § 3.155(b), imposed conditions on VA's acceptance of an informal claim when filed by certain organizations or persons. The regulation stated the rule negatively: "A communication . . . may not be accepted . . . if a power of attorney . . . was not executed at the time the communication was written." We propose to restate the rule affirmatively in paragraph (b) after the term "authorized representative". The restated rule will read, "if authorized before VA received the informal claim". This proposed change would also clarify the timing of the authorization.

Initially proposed § 5.54(b), also like current § 3.155(b), required that a power of attorney from the listed parties "was . . . executed at the time the communication was written." VA requires that it receive the executed power of attorney before it will act on a written communication from certain representatives as an informal claim. In current practice, VA accepts as an informal claim a written communication from one of the listed representatives if it meets the requirements of an informal claim and VA receives it along with a power of attorney executed as regulation requires. "At the time the communication was written" is ambiguous. It could mean the power of attorney was executed simultaneously, more or less contemporaneously, or simply before the communication was written. VA has no mechanism to ascertain whether the power of attorney was executed at any of these times, nor need VA ensure the power of attorney was executed "at the time the communication was written." VA is sufficiently assured of the authenticity of the power of attorney and of the authority of the representative to act for the veteran if VA receives a properly executed power of attorney and the communication the representative wrote for the claimant together.

Initially proposed § 5.54(b) contained a cross reference to 38 CFR 14.631, "Powers of attorney; disclosure of claimant information." Because § 14.630, "Authorization for a particular claim", also describes a type of authorized representative, we propose to add a cross reference to that section, too.

We propose to reorganize the elements of initially proposed paragraphs (a) and (c) that addressed the effect of filing an informal claim, combining them in paragraph (c). Paragraph (c)(1) applies to original informal claims. Initially proposed paragraph (a) provided that VA will "forward" an application to anyone who files an informal claim, but has not filed a formal claim. We propose to revise this to say that VA will "furnish an appropriate application to a person who files an informal claim". This is consistent with § 5.50(a), which requires VA to furnish an "appropriate application" for a benefit upon request. VA does not have an application for all benefits. We propose to make paragraph (c)(1) practicable by limiting the requirement that VA "furnish an appropriate application" to those benefits for which VA has an application.

The initially proposed rule prescribed that VA would accept the date of receipt of an informal claim as the date of the claim, "If [the application is] received within 1 year after the date it was sent to the claimant". We propose to add to paragraph (c)(1) that "VA will take no action on the informal claim until the claimant files the completed application." Though the initially proposed language stating that VA forwards the application "for execution" implies that it must be returned executed (that is, completed), it is clearer to say so explicitly.

We propose to revise initially proposed paragraph (c) as paragraph (c)(2). We propose to remove "an informal request" and "will be accepted as a claim". The revised regulation will prescribe VA's action upon receipt of an "informal claim" from a claimant who has previously satisfied § 5.51 or § 5.52, as did the initially proposed regulation.

We propose to remove the term "informal request" for the same reason we propose to remove "action" from paragraph (a). Any "informal request" for an increase or to reopen must be a communication indicating "an intent to apply for one or more benefits", that is, an informal claim. We propose to remove "will be accepted as a claim", because to say that VA will accept an informal request as a claim if the claimant previously satisfied the requirements of § 5.51 or § 5.52 is merely to say that an informal claim is a claim under those circumstances. That is exactly what the regulation means, and VA has never intended an "informal request" to be something different from an informal claim. Using another term for an informal claim confusingly suggests that there is some other type of "informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a VA benefit" that might not be an informal claim. As the definition of "claim" reveals, this cannot be so. See § 5.1, defining "claim".

Paragraph (c)(2) provides that VA will act on an informal claim without requiring another application from a person who has previously filed an application. The initially proposed rule and current § 3.155(c) allowed an informal claim for increase or to reopen to be accepted without the claimant subsequently filing an application if the claimant had previously filed a claim that "met the requirements of § 5.51 [disability benefits] or § 5.52 [death benefits]". It is implicit, but not obvious, that VA can accept an informal claim for each type of benefit without requiring a subsequent application only if the claimant has previously filed an application for that type of benefit. An application that provides information critical to the benefit claimed satisfies the statutory requirement to file a claim "in the form prescribed by the Secretary". Fleshman, 138 F.3d at 1431-32

(Applicant must file claim containing specified information, and without the "critical information" it will not be "in the form prescribed by the Secretary" so as to comply with 38 U.S.C. 5101(a)). It is VA's receipt of the information critical to a claim for disability benefits or for death benefits that enables VA to accept a subsequent informal claim for disability benefits or death benefits without requiring another application.

The previous filing of a claim for disability benefits will not have provided VA the critical information necessary for the claimant to have met the requirement of 38 U.S.C. 5101(a) for a claim for death benefits, and vice versa. As proposed to be revised, § 5.54(c)(2)(i) and (ii) will explicitly state the implicit requirement in initially proposed § 5.54(c) that VA will accept an informal claim for increase or to reopen a claim for disability or death benefits only if the claimant has previously filed a claim for that type of benefit.

§ 5.55 Claims Based on New and Material Evidence

We propose to revise initially proposed § 5.55 in response to a comment and based on our further review of the regulation. The commenter requested that VA make the rule clearer and use the active voice. We propose to revise this regulation to enhance readability and be more consistent with the format of other part 5 regulations.

The proposed revisions describe the process of, and provide instructions for, reopening a claim that the initially proposed regulation did not. The proposed revisions afford the claimant the same rights, however, and prescribe the same burdens and

duties for the claimant and for VA in seeking to reopen a claim as did the initially proposed regulation. They articulate current VA practice in implementing 38 U.S.C. 5108, which requires VA to "reopen the claim and review the former disposition" if "new and material evidence is presented or secured". They also make explicit several aspects of reopening a claim that are implicit in the initially proposed and the current regulation.

We propose to move the definition of a "reopened claim" from initially proposed § 5.57(f) to § 5.55(a) and (d) and restate it as a list of conditions necessary to reopen a claim VA has finally denied.

Initially proposed § 5.55(a) stated, "A claimant may reopen a finally adjudicated claim". The paragraph characterized new and material evidence in reference to "evidence of record at the time of the last prior final denial of the claim sought to be reopened". Both quoted phrases come from current § 3.156(a). As now proposed, § 5.55(a) states, "A claimant may reopen a claim if VA has made a final decision denying the claim." It would be redundant to state that a claimant may reopen a "finally" adjudicated claim because we define "claim" in § 5.1 and we define "final decision" in § 5.1. A claim is not subject to reopening if a prior decision is not final. Therefore, in order to reopen a claim, paragraph (a) of this section requires the existence of a final decision denying that claim. These changes are consistent with the circumstances in which a claimant will seek to reopen a claim.

We propose to move the language in initially proposed § 5.57(f) regarding the Board of Veterans' Appeals (Board) treatment of certain evidence into § 5.55(d) because it relates to new evidence in the context of reopening a claim. We have shortened that language because under § 20.1304(b)(1)(i), any evidence or request for hearing referenced in that rule will be returned to the RO "upon completion of the Board's action on the pending appeal". Therefore, the RO will apply § 20.1304(b)(1)(i) only in the context of a final denial, which is already discussed in § 5.55(a), or a grant or remand, in which case, the provisions of § 5.55 are irrelevant. The primary relevance of § 20.1304(b) to § 5.55 is that evidence submitted to the Board prior to its decision, but not considered by the Board, as set forth in § 20.1304(b), may be considered "new" for purposes of § 5.55.

We propose not to include the provision contained in § 5.57(f) regarding hearings in § 5.55(d). When a claimant requests a hearing at the Board more than 90 days after certification of an appeal and transfer of the claims file to the Board, the Board will not allow the hearing unless there is a showing of good cause for the delayed request. If the Board finds good cause and allows the hearing, then any testimony presented is considered in deciding the appeal. If the Board does not find good cause, then it will decide the appeal without conducting the hearing. In that case, it will refer the hearing request to the AOJ as required by 38 CFR 20.1304(b)(1)(i). Any testimony presented at a subsequent AOJ hearing on a claim for a benefit the Board denied would necessarily be "[e]vidence the claimant presented . . . since VA last made a final decision denying

the claim the claimant seeks to reopen" under § 5.55(d)(1). Therefore, there is no need to include the § 5.57(f) language about hearings.

We propose to add paragraphs (b) and (c). Proposed paragraph (b) states, "To reopen a claim, the claimant must present or VA must secure new and material evidence. If VA receives a claim to reopen, it will determine whether evidence presented or secured to reopen the claim is new and material." Proposed paragraph (c) reads, "If the claimant has presented or VA has secured new and material evidence, VA will reopen and decide the claim on its merits." Together, these paragraphs clearly prescribe the sequence of actions in reopening a claim, implementing 38 U.S.C. 5108 and long-standing judicial precedent. See Manio v. Derwinski, 1 Vet. App. 140 (1991).

We propose to move the definition of "new and material evidence" in initially proposed § 5.55(a) to paragraph (d), so it now follows the information a claimant needs to know about the process of reopening a claim. We propose to reorganize the definition of "new and material evidence" as a set of criteria that evidence must meet to be "new" and a set of criteria it must meet to be "material".

As initially proposed, the definition of "new and material" evidence could be misconstrued to imply that "new and material" evidence has some sort of combined characteristics in addition to those that satisfy the requirement that it is new and that it is material. VA has never intended the term "new and material evidence" to be interpreted this way, and the Federal Circuit has rejected such an interpretation. Anglin v. West,

203 F.3d 1343, 1346 (Fed. Cir. 2000) (rejecting appellant's assertion that "the concepts of newness and materiality are so intertwined that they cannot meaningfully be separated into 'prongs' of a test").

In proposing the current definition of "new and material evidence", 38 CFR 3.156(a), VA stated, "We propose to clarify the definition of 'new and material evidence' . . . to state that 'new evidence' means . . . evidence not previously submitted to agency decisionmakers, that is neither cumulative nor redundant of the evidence of record at the time of the last final denial of the claim." 66 FR 17838, Apr. 4, 2001. The courts have consistently associated "cumulative" with a failure of evidence to be New See, le.g., Anglin, 203 F.3d at 1346-47 (holding that CAVC correctly used first prong of Colvin test in finding appellant who filed "cumulative" evidence had not filed "new" evidence); Elkins v. West, 12 Vet. App. 209, 212 (1999) (new evidence is evidence not of record at time of last final disallowance of the claim and not merely cumulative of other evidence that was then of record); Colvin v. Derwinski, 1 Vet. App. 171, 174 (1991) ("New evidence is not that which is merely cumulative of other evidence on the record.") (overruled in part by Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998)).

In Anglin, the Federal Circuit affirmed the holding of the CAVC that the appellant's cumulative evidence was not new evidence. 203 F.3d at 1347. The Federal Circuit explained that Hodge did not overrule the first prong of the so-called Colvin test of "new and material evidence." 203 F.3d at 1346 ("[N]othing in Hodge suggests that the understanding of 'newness' as embodied in the first prong of the Colvin test is

inadequate or in conflict with the regulatory definition of new and material evidence."). The Anglin court rejected the appellant's argument that "the concepts of newness and materiality are so intertwined that they cannot meaningfully be separated into 'prongs' of a test." Id. at 1346. The CAVC explicitly found "[b]ecause the evidence presented . . . was not new, the CAVC did not examine whether it was material. This application of the first prong of the Colvin test was entirely consistent with the regulatory definition of new and material evidence." Id. at 1347. As restated, proposed § 5.55(d) clearly distinguishes between new evidence and material evidence. It makes clear what new evidence is, what material evidence is, that to reopen a claim the evidence must meet both criteria, and that failure of the claimant to present or of VA to secure either will bar reopening the claim.

Initially proposed § 5.55(a) reiterated the language of current § 3.156(a), "New evidence means existing evidence", and "Material evidence means existing evidence". For the following reasons, we propose to remove the term "existing" in both instances.

In 2001, VA amended the definition of "new and material evidence" to implement the Veterans Claims Assistance Act of 2000, Public Law 106-475, sec. 3, 114 Stat. 2096, 2096-98 (2000), which mandated that VA assist claimants to substantiate their claims. In doing so, VA prescribed the assistance it would give a claimant to substantiate a claim to reopen by limiting its duty to obtain new and material evidence to obtaining "existing evidence", as distinguished from newly created evidence. 66 FR 17837-38, Apr. 4, 2001. VA did this to avoid the implication that, under the VCAA of

2000, it had a duty to create new evidence, for example through a medical examination. 66 FR 45628, Aug. 29, 2001 ("VA would not provide an examination or obtain a medical opinion to create new evidence"). VA intended "existing evidence" to mean "evidence that is not newly generated by or with the help of VA". 66 FR 17838, Apr. 4, 2001.

Nonetheless, if "new" evidence and "material" evidence both mean "existing" evidence, then initially proposed § 5.55(a) could be misconstrued to mean that VA would not accept any evidence newly created to reopen the claim because it is not "new and material" as defined. As initially proposed, the rule could produce the strange result, for example, of VA rejecting a new medical opinion that a claimant obtains and files to reopen a claim as not "new and material evidence", because it would not be "existing evidence." We therefore propose to remove the term "existing" to avoid any potential for such misapplication.

There is no need to qualify "new and material evidence" as "existing evidence" to ensure that VA's duty to assist the claimant in obtaining new and material evidence is as limited as VA intends. In any claim, the claimant must identify existing evidence and provide VA the information necessary to obtain this evidence before VA is obligated to try to procure that evidence for the claimant. See proposed § 5.90(c). Nothing about asserting that the evidence is new and material or the fact that the claimant wants VA to obtain that evidence in order to reopen a claim exempts the claimant from his or her obligation. Consequently, the definition of new and material evidence does not need the qualifier "existing" to limit VA's duty to assist. Likewise, another paragraph of the

"duty to assist" regulation provides that VA has no duty to assist a claimant seeking to reopen a claim by providing medical examinations or obtaining new medical opinions until new and material evidence is presented or secured. See proposed § 5.90(c)(4)(iii). Therefore, the definition of "new and material evidence" does not need the qualifier "existing" to proscribe a duty to provide medical examinations or obtain medical opinions for the claimant seeking to reopen a previously finally denied claim.

Finally, we propose to redesignate initially proposed paragraph (b), "Effective date", as paragraph (e). We propose to change the term "awards" to "grants", consistent with the use of "grant" in part 5 as a verb meaning to decide a claim affirmatively.

§ 5.56 Report of Examination, Treatment, or Hospitalization as a Claim

We propose to revise and reorganize this regulation for simplicity. We also propose to address several specific issues.

We propose to revise initially proposed paragraph (a) so that it simply states the purpose and effect of this section. It is necessary to explain that evidence construed as a claim in accordance with this section meets the claim requirement of § 5.51(a), because after VA receives such evidence, VA requires the claimant to take no further action to establish that he or she has filed a claim. In other words, the evidence constitutes a claim "that is in the form prescribed by the Secretary" for filing the claims to which this section applies.

We propose to add a new paragraph (b), “Claims excluded”, which provides that VA’s receipt of a report of examination, treatment, or hospitalization is a claim only under the circumstances named in paragraph (c) of this section. We emphasize this point by explicitly excluding from the scope of this section new claims for service connection.

In reviewing the initially proposed regulation, we noticed that in some places we referred to a report of examination or hospitalization and in others we referred to a report of examination or treatment. Our intent was to accept a report of examination, treatment, or hospitalization as a claim in the situations described. We propose to revise this regulation, including the title, to reflect that any of these types of medical reports may be a claim for increased benefits or for pension under the circumstances described. The revised title also represents the content of the regulation more accurately.

We propose to reorganize initially proposed paragraph (b) of this section and redesignate it as paragraph (c), “Claims included”. We propose to replace the initially proposed language with four succinct statements, (c)(1), (2), (3), and (4). Each statement articulates a circumstance in which VA’s receipt of medical records is a claim and identifies what type of claim it is, for example, a claim for increased disability compensation. We propose not to repeat the language, “or once a formal claim for disability compensation has been denied because the service-connected disability is not

compensable in degree". We also propose not to repeat the language, "or an informal claim to reopen". Both phrases are superfluous and potentially confusing to readers. VA formerly considered claims where VA granted service connection for an injury or disease, but rated the disability as 0 percent disabling as having been disallowed or denied. See Par. 4, VA Technical Bulletin 8-180, "Claims for Increase and Reopened Awards" (June 13, 1951). VA considered hospital treatment records as "an informal claim to reopen" such a claim in order to receive a compensable rating. Id.

VA currently considers claims for disability compensation to have been granted, notwithstanding that the disability is rated 0 percent, so long as VA granted service connection. This is because even a 0 percent rating can yield disability compensation or other benefits, such as medical treatment. See 38 CFR 3.324, "Multiple noncompensable service-connected disabilities". Because VA no longer considers such claims disallowed or denied, they cannot be "reopened". Instead, a claimant who believes he or she is entitled to more than a 0 percent rating need only file a claim for an increased rating. Hence, we propose to remove the above-referenced language from redesignated § 5.56(c). Furthermore, 38 CFR 3.157 has never applied to permit the reopening of a claim that was denied because the claimed injury or disease was not service connected. 38 CFR 3.157(b) applies only where "a formal claim for . . . compensation has been allowed or . . . disallowed for the reason that the service-connected disability is not compensable in degree". Removing the above-referenced language will remove any possible confusion on this point.

The reasoning for not using the term “disallowed” or “denied” or referring to a “reopened” claim in the context of a prior grant of service connection to a veteran rated 0 percent disabled also applies to claims under this section from veterans receiving retired pay. Proposed paragraph (b)(2) changed “disallowed” to “denied” in restating the § 3.157(b) rule about retirees. Section 3.157(b) provides for claims from “a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay.” “Disallowed” is used there in the same sense in which § 3.157(b) uses it to refer to nonpayment of disability compensation to a service-connected veteran rated 0 percent and for the reason discussed above; such a claim is not “reopened.” VA may grant service connection to a veteran, yet not pay disability compensation because the veteran elects to receive retired pay rather than VA disability compensation. VA would also not pay pension to the retiree in receipt of retired pay if the amount of retired pay is greater than the amount of income above which VA will not pay pension benefits. In neither instance is a claim under this section “reopened” or a claim to reopen. Our proposed restatement of initially proposed § 5.56(b)(2), to be redesignated as proposed paragraph (c)(3), includes a heading that accurately describes the circumstances in which the section applies to veterans receiving retired pay. It also describes the claims, simply, as for disability compensation or for pension.

Initially proposed § 5.56(c)(3) used the term “retirement pay”. Upon further review, we noted that the terms “retirement pay” and “retired pay” were inconsistently used in part 3. To correct this inconsistency, we propose to use the term “retired pay”

throughout part 5 when we are referring to “payment received by a veteran that is classified as retired pay by the Service Department”. See proposed § 5.745(a), for the definition of “military retired pay”.

We propose to redesignate initially proposed paragraph (c) as paragraph (d). Initially proposed § 5.56(c)(1)(i) read:

> The provisions of paragraph (c)(1) of this section apply only when the reports described in paragraph (c)(1)(ii) of this section 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 1 year after the date of an examination, treatment, or hospital admission described in paragraph (c)(1)(ii) of this section.

We have not repeated the quoted language of initially proposed paragraph (c)(1)(i) in redesignated paragraph (d)(1)(i). The first clause of the initially proposed language, as with the equivalent language in § 3.157(b)(1), stated, “The provisions of paragraph (c)(1) of this section apply only when the reports described in paragraph (c)(1)(ii) of this section relate to examination or treatment of a disability for which service-connection has previously been established”. The purpose of this language is to emphasize that medical records will not be considered a claim for service connection for a disability. As stated, however, it would preclude the reports described from being a claim for pension. VA has never applied the rule to reject records from a VA or uniformed service medical facility as a claim for pension following a prior grant or denial of pension. We therefore propose to remove the language to avoid such a misapplication of the rule.

The language in the quotation above (§ 5.56(c)(1)(i)) also tracks language from current § 3.157 that was intended to govern a situation in which a claimant obtained treatment for a service-connected disability and during that treatment, the examiner noted the existence of another disability. Before 1962, 38 U.S.C. 3011 had described an award of increased disability compensation or pension as "an award of increased compensation . . . or pension (amending, reopening, or supplementing a previous award, authorizing any payments not previously authorized to the individual involved)". 38 U.S.C. 3011 (1958). Thus, the law seemed to provide that a claim for increase included a claim for additional disability compensation based on a new disability, if the veteran was already receiving disability compensation. However, that language has long since been repealed. See Public Law 87-825, sec. 5(a), 76 Stat. 948, 950 (Oct. 15, 1962). Current law does not provide for the possibility of assigning a 1-year retroactive effective date of disability compensation awarded based on a new disability (unless the claim for disability compensation is received no later than 1 year after the veteran is discharged from service, see 38 U.S.C. 5110(b)(1)). In this and other respects, current law does not treat a claim for disability compensation based on a new disability in the same manner as a claim for increased disability compensation based on an increase in the severity of a disability that is already service connected. Thus, this regulation governing the consideration of medical evidence as a claim can no longer apply to a claim based on a disability not previously claimed. This is consistent with our analysis of the first sentence of current § 3.157(b), discussed above, in which we explained why the part 5 rule will not refer to a prior claim having been "disallowed" or to a claim needing to be reopened.

One commenter suggested that the meaning of the phrase "or when a claim specifying the benefit sought" that had been used in initially proposed § 5.56(c)(1)(i) should be explained more thoroughly. The commenter noted some confusion concerning its meaning based on the dissent in Ross v. Peake, 21 Vet. App. 534 (2008) (Order denying full-court consideration) (Judge Kasold, dissenting).

As stated above, the language "or when a claim specifying the benefit sought" is a vestige of a statute that is no longer in effect. We are not using the phrase in part 5, and therefore we do not need to further explain its meaning.

Regarding the Ross dissent, Judge Kasold interpreted a similar provision in current § 3.157 as providing an earlier effective date for claims for secondary service connection. This view, however, directly contradicts the holding of the Federal Circuit in MacPhee v. Nicholson, 459 F.3d 1323 (Fed. Cir. 2006). Judge Kasold believed that § 3.157 "envisions a claim for increased compensation based on a disability for which service connection has not yet been granted." Ross, 21 Vet. App. at 535. In MacPhee, however, the Federal Circuit held that an informal claim pursuant to § 3.157 "must be for a condition that not only has been the subject of a prior claim, but the condition must also have been previously found to be service connected." MacPhee, 459 F.3d at 1326. Thus, § 3.157 does not support the assertion that a claim for benefits for a separate disability may be considered a claim for increased disability compensation.

The sources of evidence that can constitute a claim under paragraph (d)(1) (initially proposed paragraph (c)(1)) are regrouped in paragraph (d)(1)(ii) as (d)(1)(ii)(A) through (D), according to date of claim that results from submission of the particular evidence. Though this makes a fourth level of designation in the rule, it should enhance readability.

Initially proposed paragraph (c)(3)(i), regarding evidence from state and other institutions, stated, "Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination." We propose to change "official" to "VA", to make clear that the official examination to which the sentence refers is a VA examination. We also propose to add the phrase, "and demonstrate entitlement to an increased rating, to pension, or to special monthly pension " after "rating purposes" to clarify that mere receipt of such evidence does not establish entitlement to benefits.

Initially proposed paragraph (c)(3)(ii) included the phrase "and entitlement is shown", derived from current § 3.157(b)(3), as a condition on the date of VA receipt of evidence from state and other institutions as the date of a claim. Neither § 3.157(b)(1) nor (b)(2) contains such a restriction. We therefore propose to remove this language because if the claimant does not eventually establish entitlement to the benefit, then the date of receipt of the claim has no legal significance. Therefore, the language, "and entitlement is shown" is superfluous.

Finally, we propose to revise initially proposed paragraph (d), "Liberalizing law or VA issue", for clarity and to redesignate it as paragraph (e).

§ 5.57 Claims Definitions

We propose to revise the format of this regulation to be consistent with the format of other regulations that provide definitions. We propose to revise the title of the regulation to be, "Claims definitions", because it more clearly indicates the contents of the regulation.

We also propose to restate and expand the scope of the definitions. The initially proposed rule, like current § 3.160 from which it derives, stated that the definitions applied to claims for pension, disability compensation, and DIC. VA administratively processes claims under 38 U.S.C. chapter 18 in the same manner as VA processes pension, disability compensation, and DIC. Therefore, we propose to restate the scope of § 5.57 as applying to claims for disability benefits, death benefits, or monetary allowance for a veteran's child under 38 U.S.C. chapter 18. The proposed change to "disability benefits" and to "death benefits" (from "pension, disability compensation, and dependency and indemnity compensation") better harmonizes the scope of the regulation with the regulations on claims for disability and for death benefits. See §§ 5.51 and 5.52.

We propose to remove initially proposed paragraph (a), definition of "formal claim". As initially proposed, the definition, "A claim filed on the application required", was impracticable. There are benefits for which VA does not have an application, for example benefits under 38 U.S.C. 1151. Moreover, as a result of revision of several other proposed regulations, the term does not appear in part 5 other than in its definition. There is no need to define a term that is not used.

We propose to redesignate initially proposed paragraph (b), "Informal claim", as paragraph (a).

We propose to redesignate initially proposed paragraph (c), "Original claim", as paragraph (b). We propose to revise the definition to state, "Original claim means the first claim VA receives from a person for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18." This restatement eliminates the term "formal claim". It is the lack of a prior claim for any disability, death, or chapter 18 benefit that makes a claim the original claim for the benefit.

It is confusing to define the original claim as "the initial formal claim". More significantly, it is fallacious. Even if we kept the definition of "formal claim" as a claim filed on a prescribed application, the lack of an application for some benefits would make the initially proposed definition of "original claim" impracticable. If an original claim must be an application and there is no application for some benefits, then there cannot be an original claim for some benefits. That conclusion is untenable.

We also propose to add “from a person” to be clear that when two or more claimants each file a claim for the same benefit, each claim will be the original claim for that person. For example, two siblings each filing a claim for DIC based on the death of the same veteran would each have an original claim. This was not apparent in the initially proposed regulation.

We propose to remove initially proposed paragraph (e), “Finally adjudicated claim”. It is essentially redundant of the definition of “final decision” in § 5.1. The definition of “final decision” in § 5.1 encompasses the definition of “finally adjudicated claim” in § 3.160(e), but it is more precise. The procedural posture of finality of VA decisions applies to VA claim adjudication more broadly than just to claims for pension, disability compensation, DIC, and monetrary allowances under 38 U.S.C. chapter 18. For that reason, it is more appropriate for the rule defining finality to be in § 5.1 than in § 5.57, which has a limited scope.

One commenter objected to the title of § 5.57(f), “Reopened claim”, asserting that the title is misleading because the paragraph does not describe what a reopened claim is and is not consistent with how VA and the courts have used the term. This commenter felt that a better title would be, “Claim to reopen.” We agree that “reopened claim” is inaccurate. As noted by the commenter, this paragraph concerns submission of evidence, information, or an assertion of entitlement to a procedure applicable to a previously decided claim. Such submission of evidence, information, or an assertion of

entitlement to a procedure applicable to a previously decided claim may not always result in the claim being reopened. We propose to use the suggested phrase "claim to reopen". However, we propose to do so in the context of moving the paragraph to § 5.55(a), as we discussed above regarding § 5.55.

Duties of VA; Rights and Responsibilities of Claimants and Beneficiaries AL82

General Comment on VA Claims Process

One private individual submitted a comment concerning the length of time VA takes to process a claim and his dislike of the appeal process. This comment is outside the scope of these proposed regulations, and we therefore propose to make no changes based on this comment.

§ 5.80 Rights to Representation.

Two commenters suggested that this initially proposed section was deficient in its scope. They expressed a belief that a claimant or beneficiary should be given notice of the right to representation throughout the adjudicative process, not only when VA sends notice of a decision or a proposed reduction, discontinuance, or other adverse action. Both expressed the opinion that VA should notify the claimant of the right to representation at the beginning of the claims process.

It has been VA's long-standing practice to provide notice to claimants of the right to representation in VA's initial response to the claimant after VA receives a

substantially complete application. We propose to revise initially proposed § 5.80 to state that written notice concerning the right to representation will be included in the initial response VA sends to the claimant after receipt of a substantially complete application.

One commenter noted that initially proposed § 5.80 failed to set out in detail the crucial role of the representative in the adjudicative process. Another commenter urged VA to include in initially proposed § 5.80 the limitations on hiring an attorney.

Part 3 regulations do not describe the role of representatives in the adjudicative process or the limitations of hiring an attorney and we do not believe part 5 should either. The rights, duties, limitations and role of a representative are in 38 CFR 14.626 – 14.637. The first sentence of § 5.80 refers the reader to those sections. We are making no changes in the language of the regulation in response to these comments. We have, however, added a cross reference at the end of initially proposed § 5.80 to 38 CFR 19.25, “Notification by agency of original jurisdiction of right to appeal”, which requires that VA include the right to representation in its notice of an adverse decision on a claim.

One commenter urged VA to include a provision acknowledging the right of both the claimant and the claimant’s representative to automatically receive copies of evidence secured by VA. The commenter asserted that access to the evidence

developed and relied upon by VA to reach its decision is crucial to proper notice and is a fundamental due process right.

A veteran and representative are entitled to a copy of the evidence or other written records contained within a veteran's claims file in accordance with the provisions of 38 U.S.C. 5701(b)(1), as implemented in 38 CFR 1.503. The veteran or representative must make a written request for the copies of the evidence in accordance with the provisions of 38 U.S.C. 5702(a). See 38 CFR 1.526. The procedures for a veteran and the representative to obtain copies of the evidence used in deciding a claim have been established by statute and VA has implemented these procedures in our regulations. If VA adopted the rule that the commenter urges, it would require VA to copy and mail every document it acquires regardless of its relevance to the veteran's claim. We do not believe that it would be an appropriate use of VA's limited resources to automatically provide both the claimant and the claimant's representative with copies of every piece of evidence that VA secures.

The procedures provided in current statutes and regulations do not infringe on the claimant's due process rights. The claimant has the right to notice of the evidence VA will attempt to obtain on the claimant's behalf, of the evidence the claimant has the responsibility to obtain and submit, and of the decision on the claim. If the decision is adverse, the notice must include a discussion of the evidence considered and the reasons and bases for the decision and it must include the claimant's appellate rights. The claimant may, upon written request, generally obtain a copy of the evidence used in

making the decision on the claim. Since our regulations already provide for the result the commenter requested, though not in the manner urged by the commenter, we propose to make no changes based on this comment.

§ 5.81 Submission of Information, Evidence, or Argument.

Initially proposed § 5.81(a), "*Submissions included in the* record", referred to submissions "that a claimant offers. . ." One commenter asserted that § 5.81(a) failed to specify that a claimant's recognized representative has the authority to raise issues on behalf of a claimant.

As stated in our response to a similar comment on initially proposed § 5.80, part 3 regulations do not describe the role of representatives in the adjudicative process or the limitations of hiring an attorney and we do not believe part 5 should either. Initially proposed § 5.81(a) was not intended to regulate the specific authority of a claimant's or beneficiary's representative. This information is codified in §§ 14.626 – 14.637, to which § 5.80 refers, and to include it in part 5 would be redundant. We therefore propose to make no change based on this comment.

In initially proposed § 5.81(a), we used the term "record of proceeding" twice. We have substituted the term "evidence of record" to be consistent with the other part 5 regulations. This regulation was the only one in part 5 to use the term "record of proceeding".

Initially proposed § 5.81(b) stated:

> Information, evidence, or argument may be submitted by a claimant or beneficiary, or, where applicable, through a guardian or fiduciary acting on his or her behalf. Unless specifically provided otherwise in this part, a claimant's or beneficiary's authorized representative may submit information, evidence, or argument pursuant to any section of this part that allows or requires submission of information, evidence or argument.

Two commenters expressed concern with this paragraph as implying some new restriction on a representative's authority to submit material on behalf of a client. One commenter argued that this section is inappropriate because an authorized representative stands in the same position as the client and should be allowed to submit evidence and arguments as if he is the claimant or beneficiary. The same commenter suggested inserting the phrase "or their authorized representative" after "beneficiary" and deleting the second sentence.

We did not intend to constrain an authorized representative's role or authority in the VA claims process. After reviewing initially proposed § 5.81(b) because of the comments received, however, we noted that all the information contained in the paragraph is also in other regulations. Section 1.524 provides for the right of a fiduciary, representative, attorney, or other authorized person to represent the claimant. Sections 13.1, et seq., and 14.626 – 14.637 provide specific provisions concerning these representatives. Because other regulations provide for the rights and duties provided in initially proposed § 5.81(b), and do so in greater detail, § 5.81(b) is redundant, and we propose to remove it.

§ 5.82 Right to a Hearing.

We propose to add language to initially proposed § 5.82(a) to make clear that the section pertains only to hearings in claims at the agency of original jurisdiction level of adjudication. We propose to change "claimants" to "claimants and beneficiaries", except in paragraph (f), to make clear that the rules in § 5.82 apply to claimants and to current beneficiaries. Paragraph (f) pertains only to hearings in response to a VA proposal to take adverse action regarding a beneficiary's benefits. Finally, we propose to change "claim" to "matter" to clarify that if a beneficiary requests a hearing to give testimony or evidence on whether VA should take adverse action against the beneficiary's benefits, such a hearing is within the scope of § 5.82.

Further review of the initially proposed regulation revealed a contradiction between paragraphs (a)(1) and (f). Initially proposed paragraph (a)(1) provided for one hearing "at any time on any issue". Initially proposed paragraph (f) provided, as does current § 3.105(i) from which it derives, that a beneficiary must request a hearing on the issue of reduction, discontinuance or other adverse VA action within 30 days after receipt of a notice of VA's proposal to take the adverse action. Therefore, a hearing under paragraph (f) is not available "at any time on any issue". We propose to reconcile the two paragraphs by beginning paragraph (a)(1), "Except as provided in paragraph (f),". This is not a change from current regulation. Compare §§ 3.103(c) ("a hearing on any issue at any time") with 3.105(i) ("a predetermination hearing [if] a request . . . is received within 30 days"). It merely clarifies the relationship between paragraphs (a)

and (f). This relationship exists between §§ 3.103(c) and 3.105(i), but it becomes obvious when the provisions are consolidated in a single section.

We propose to revise the second to last sentence of initially proposed § 5.82(a), removing the statement entitling a veteran to a hearing before the Board of Veterans' Appeals (Board). Instead, we propose to add a cross reference to the introduction to make the reader aware of Board hearings and to distinguish between hearings at the AOJ and at the appellate levels of adjudication. We propose this change because 38 CFR part 20 provides for the right to a hearing before the Board, and it is not appropriate to regulate Board hearings in part 5.

The initially proposed rule allowed, "one hearing before the agency of original jurisdiction at any time on any issue or issues involved in a pending claim before the agency of original jurisdiction" and permitted one additional hearing "if the claimant asserts that: he or she has discovered a new witness or new evidence to substantiate the claim; he or she can present that witness or evidence only at an oral hearing; and the witness or evidence could not have been presented at the original hearing." Four commenters asserted that the limitation in initially proposed § 5.82 on the number of hearings allowed was too restrictive. For the reasons stated in response to specific comments, we disagree that the regulation is too restrictive and we reject each of the reasons argued for keeping the current rule.

One commenter asserted that the "one-hearing rule" diminishes claimants' right to due process because it is inconsistent with the VA's tradition of giving claimants the opportunity to continue to produce and submit evidence or argument as a claim develops. It might be true that the one-hearing rule could inhibit ongoing production of evidence or argument throughout the time a claim is pending, if a personal hearing were the only way to submit evidence or argument to the record in a claim, but it is not. Section 5.81, the regulation governing submission of evidence and argument generally, could scarcely be more permissive regarding entering material into the record in a claim: A claimant may submit virtually anything, at almost any time, by nearly any means. Nothing in § 5.82 diminishes the right to submit material to the record in a claim throughout the time the claim is pending, except as limited by the rules of the Board of Veterans' Appeals for submission of material after the AOJ transfers a claim to the Board on appeal. 38 CFR 20.1304.

The same commenter asserted the rule is inconsistent with the current due process right to a hearing before the initial decision on a claim. The commenter requested that we include a provision informing the veteran of the right to a hearing before VA makes a decision on a claim. We interpret the comment to express concern that an adverse decision in a claim could bias a subsequent decision-makers, and that a claimant would have to overcome that bias in a subsequent hearing. Initially proposed paragraph (d) provided that "a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing." The comment offered no basis to believe that a VA official conducting a hearing would

not be impartial, and we propose to make no change to preempt a bias that is not demonstrated.

To the extent the commenter is concerned about lack of notice to the claimant of the right to a hearing before the decision on a claim, VA does notify claimants of the right to a personal hearing at any time, including before VA has decided a claim. See, for example, VA Form 21-526, instructions page 6, Veteran's Application for Compensation and/or Pension (Jan. 2004), or VA Form 21-534, instructions page 2, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable). Because VA already provides this information to claimants, we propose to make no change based on this comment.

Absent the discovery of a new witness or evidence, there is no valid reason to hold an additional hearing. A single hearing provides full and fair opportunity to place demeanor evidence in front of the decision maker, which satisfies a primary object of personal hearings. The one-hearing rule with its paragraph (a)(2) allowance for a second hearing under the stated circumstances provides a fair and rational balance between the rights of the claimant and the resources of the department. Repeated interruption of the adjudication process for hearings can result in confusion about the evidence to review and in interminable delay, both of the claims subjected to repeated hearings and to the progress of the claims of others who wait their turn. These are not inconsequential concerns. If a claimant wants to submit new arguments, he or she may

do so in writing at any time. We therefore propose to make no changes based on these comments.

Another commenter asserted that the provision for an additional hearing is likely to result in VA arbitrarily refusing an additional hearing that a claimant would use to respond to evidence that entered the record subsequent to the first hearing, resulting in limiting a claimant to one hearing in almost all circumstances. After noting the criteria for a second hearing in paragraph (a)(2), the commenter asserted that paragraph (a)(2) should provide for additional hearings "when warranted by circumstances" or "for good cause" and authorize VA to refuse a second, third, or further additional hearing "when clearly unwarranted." The commenter asserted that there are many circumstances that would warrant an additional hearing that would not meet the criteria in paragraph (a)(2). The commenter asserted that the claimant should be able to testify to additional matters even though the testimony would not amount to newly discovered evidence or present a different witness. The commenter further asserted that paragraph (a)(2) would allow a claimant a second hearing for a new witness to testify in corroboration of prior testimony, that is, to provide cumulative testimony. The commenter concluded that the several requirements for a second hearing, including that the hearing be the only way to present the evidence or testimony, is a license for refusal by VA personnel to afford a supplemental hearing in virtually all cases.

We recognize the commenter's concern that the one-hearing rule will thwart a claimant's legitimate desire to respond to developments during the pendency of the

claim. The threshold for obtaining a second hearing, however, is a mere assertion of the factors in the exception paragraph. We see no basis for the speculation that VA will probably refuse almost all requests. It seems likely that a claimant's desire to testify or present witnesses or evidence to rebut evidence that entered the record after a prior hearing is exactly a situation in which the claimant could not have adduced the new evidence or witnesses' testimony before the evidence it would rebut was of record.

We do not agree that the standards for obtaining a second hearing invite arbitrary or capricious refusal of requests for second hearings, or even that VA will deny most requests. Rather, the rule the commenter proposed "where circumstances warrant," or "for good cause," but "not when clearly unwarranted" are completely devoid of a standard of application; they seem far more likely to result in inconsistent application than do the paragraph (a)(2) criteria.

More basically, the commenter would have VA afford additional hearings even though the claimant would present no new witness or evidence; even though the claimant could present the testimony of a new witness, or new evidence, without a hearing; and even though the claimant knew of the witness, evidence or argument at the time of the first hearing and could have presented them. The commenter "concede[d] that VA has a legitimate interest in preventing duplicative and unnecessary hearings," a point with which we do agree. We conclude that the one hearing rule with the paragraph (a)(2) exception provides full and fair hearing process to each claimant.

A commenter objecting that § 5.82(a) would limit a long-standing right to unlimited hearings, asserted that VA had not provided an adequate rationale for its proposed fundamental change in its historic and traditional hearing practice. The preceding paragraphs state additional rationale for the change. Additionally, we do not agree that the change is fundamental, because VA hearing practice will continue to serve every function it has under current § 3.103(c).

The commenter further asserted that "Congress has codified and ratified the agency's traditional practice of providing claimants with multiple opportunities to appear for personal hearings." The commenter asserted that Congress is presumed to be aware of and adopt an administrative interpretation of a statute when it reenacts the statute without change, citing Young v. Cmty. Nutrition Inst., 476 U.S. 974, 983 (1986). The commenter reiterated this point regarding additional hearings at the AOJ after the Board remands a claim if the claimant had a hearing before Board review of the claim. The commenter asserted that Congress intended VA to continue its existing practice regarding hearings at the AOJ when it enacted the Veterans' Judicial Review Act of 1988, Public Law 100-687, 102 Stat. 4105 (1988), and the Veterans Claims Assistance Act of 2000, Public Law 106-475, 104 Stat. 2096 (Nov. 9, 2000), without changing the law governing provision, number, or timing of VA personal hearings. The commenter did not identify a statute the reenactment of which constituted Congressional adoption of 38 CFR 3.103(c), from which § 5.82(a) derives. Neither of the statutes cited addresses VA hearing practice. We are aware of no statute that does.

The right-to-a-hearing rule in § 3.103(c) is VA's creation, promulgated under the Secretary's general rule-making authority in 38 U.S.C. 501(a). Moreover, as judicial precedent specific to VA clearly shows, congressional silence on a regulation is not necessarily adoption or endorsement of the regulation, or even an indication that Congress is aware of the regulation. Brown v. Gardner, 513 U.S. 115, 120-21 (1994) (Sixty-year congressional silence about VA regulation did not ratify it; language of statute was plain, record of congressional discussion preceding reenactment of the predecessor statute made no reference to VA regulation and there was no other evidence to suggest Congress was even aware of VA's interpretive provision). Certainly, where VA's rule on hearings does not derive from a statute on hearings, Congress's silence about the matter does not imply a congressional view of the regulation. The cases the commenter cited for the proposition that congressional failure to revise a regulation is endorsement of it were instances of congressional action on a statute to which a certain regulation related.

The commenter also asserted as fact that "the legislative history associated with congressional oversight of the agency shows that Congress knew about VA's practices governing personal hearings and did not indicate that it disagreed with the agency's practices." As we noted above, congressional silence about a practice is not necessarily evidence of congressional endorsement. Id., at 120-21. Silence about an agency practice in the context of congressional knowledge and consideration of a matter could, however, be significant. The House Committee on Veterans' Affairs was authorized by enactment of the "Legislative Reorganization Act of 1946." Public Law

79-601, sec. 121(a). See http://veterans.house.gov/history/ (World Wide Web site of the House Committee, visited Dec. 2, 2009). The Committee has oversight responsibility for VA, which it exercises through the Subcommittee on Oversight and Investigations. See http://veterans.house.gov/oversight/ (World Wide Web site of the oversight subcommittee, visited Dec. 2, 2009). The commenter does not cite any history of the Subcommittee on Oversight and Investigations documenting its knowledge or viewpoint on VA hearing practice, or say when during the more than 60-year history of congressional oversight of veterans affairs an this expression of knowledge happened. We are not aware of any history of congressional oversight showing endorsement of VA hearing practice. Consequently, we propose to make no change in the initially proposed regulation based on the assertion that congressional oversight history shows that Congress has approved current practice.

The same commenter objected to the language in initially proposed § 5.82(a)(1) precluding a claimant who had a hearing prior to an appeal to the Board from having a second hearing if the Board remands the case, except as paragraph (a)(2) provides. The commenter quoted from the AL82 NPRM, emphasizing the discussion of current § 3.103(c), which stated, "The VA official conducting the hearing is obligated to elicit any information or evidence not already of record in support of the benefit claimed." 70 FR 24680, 24683, May 10, 2005. The commenter asserted that "as is so often the case, the requirements of the law, [sic] are conveniently forgotten by VA litigation counsel when a veteran appeals to the U.S. Court of Appeals for Veterans Claims." The commenter cited the Secretary's brief in Colon v. Nicholson, 21 Vet. App.

96 (2006) (table, unpublished decision), WL 2105515 (text), as an example of VA excusing the failure of a hearing officer to execute the regulatory mandate to explain the issues and suggest evidence to submit. The commenter quoted a passage from the brief that asserted that the appellant could have cured the failure of the Regional Office hearing officer to consider and discuss an issue in the case by having another personal hearing or by other means after the Board had remanded the case. The commenter argued that VA's argument in Colon "demonstrates . . . why VA should not limit a claimant's right to appear for personal hearings."

VA's arguments or litigation strategy in a case on appeal to the court is beyond the scope of this rulemaking, Whatever the argument or reason for an argument raised in litigation, litigation of a VA claim is far downstream in the claims process from the hearings for which § 5.82 provides. The commenter asserted that VA's argument in Colon "shows that [VA's] litigation counsel have no qualms whatsoever in presenting argument . . . to undermine the legal effect of the agency's binding regulations." The commenter essentially argues that VA should allow unlimited hearings because far downstream from the hearing the Secretary's counsel might argue to the court that a failure to follow a regulation was a harmless error in a specific case. We do not agree that a right to unlimited hearings is likely to preempt an argument at litigation, nor is that an appropriate object of regulation.

The commenter implicitly raised another point worth addressing, that is, whether there is a cure for a defective hearing, and if so, whether the one-hearing rule

thwarts that right. In practice, another hearing would cure a defect in the original hearing, and the one-hearing rule will not inhibit that remedy. VA and its hearing officers have various duties in conducting hearings, such as to explain all issues and suggest the submission of evidence the claimant might have overlooked. A right to unlimited hearings is an overly broad remedy for a defective hearing, because it would result in many redundant hearings in cases in which the initial hearing had comprehensively addressed all issues and fully provided due process.

If a hearing was defective, the claimant can assert so to the AOJ, or on appeal to the Board. A defective hearing would not be legally sufficient to satisfy the claimant's right to one hearing. The claimant would be in the position of not having had a hearing. The one-hearing rule in paragraph (a)(1) would not bar repeating the hearing to cure the defect, and the claimant would not be subject to the criteria in paragraph (a)(2) to obtain the new hearing. The claimant could obtain this new hearing from the AOJ. If the claimant appeals an adverse decision to the Board, the claimant can assert the deficiency in the hearing. A Board remand to cure a deficiency in a personal hearing would not be subject to the rule against post-remand hearings in paragraph (a)(1), because it would require AOJ implementation of a specific order within the Board's authority. 38 CFR 19.9. Consequently, the one-hearing rule does not raise the specter of deficient hearings without a remedy for the claimant. Moreover, a remand from the Board alone is not sufficient reason for another hearing in light of the reasons expressed above for the one-hearing rule. If a remand from the Board orders development of evidence, or otherwise results in the conditions that meet the criteria for

an additional hearing in paragraph (a)(2), then the claimant can obtain the additional hearing. We propose to make no change to the rule based on the comment.

We propose to reorganize initially proposed paragraph (a)(2) to make its three criteria visually clear by designating them (i), (ii), and (iii).

Initially proposed § 5.82(b) stated, in pertinent part, that, "[t]he purpose of a hearing under this section is to provide the claimant with an opportunity to introduce into the record of proceedings, in person, any available evidence, arguments, or contentions which he or she considers important to the case." One commenter asserted that the term "contention" is redundant of the term "argument," and that VA adjudicators often dismiss testimonial evidence as "mere contentions", citing Hatlestad v. Derwinski, 1 Vet. App. 164, 169-70 (1991).

Merriam-Webster's Collegiate Dictionary, 269 (11th ed. 2006), defines "contention" as "a point advanced or maintained in a debate or argument". The term "argument" includes the term "contention". We agree that it is unnecessary to include both terms in § 5.82(b) and we propose to remove the word "contentions".

We propose to make an additional change to initially proposed § 5.82(b) by removing the last sentence, that states, "[t]estimony at a hearing will be under oath or affirmation." We propose this change because the requirement that the testimony be under oath or affirmation is also found in § 5.82(d)(2), where it is more clearly

expressed. Including this requirement in § 5.82(b) is redundant and unnecessary. We propose to revise the title of this paragraph to remove the reference to the requirement for oath or affirmation.

Initially proposed § 5.82(d)(1) stated, in pertinent part, "[t]he employee or employees will establish a record of the hearing and will issue a decision after the hearing", which is substantially similar to the language in current § 3.103(c)(1). One commenter asserted that the phrase "a record of the hearing" is too vague and urged VA to clarify that testimony cannot be "manipulated, paraphrased, or summarized like minutes of a meeting." The commenter urged that the witness's exact words and complete statements be made a part of the record.

VA normally transcribes the recording of the hearing and includes the transcript of the hearing in the record of evidence. However, it would be inappropriate to require by regulation that a transcript be prepared for every hearing. There are several reasons why the recording of the hearing may not be transcribed. For example, the VA employee conducting the hearing may determine that all benefits sought should be granted. If all benefits sought are granted, there is no reason to expend resources to transcribe the recording of the hearing or to delay the promulgation of the decision while waiting for the recording to be transcribed. The decision granting the benefit would summarize the hearing testimony. Also, the claimant may withdraw the claim during the conduct of the hearing. In such situations, there is no need for a transcript. In either of these examples, the claimant would gain nothing by the VA's expenditure of resources

in transcribing the recording of the hearing. Finally, VA puts a transcript of the hearing in the claims file if the claimant or beneficiary initiates an appeal from a decision. The verbatim testimony is thus part of the evidence of record when the claimant or beneficiary seeks appellate review. To require by regulation that a transcript of the recording of every hearing be prepared would not assist the claimant and would unnecessarily expend VA resources.

Currently, VA prepares a transcript of the hearing if the VA employee conducting the hearing needs one in making a decision on the claim, if the claimant (or the claimant's representative) requests a copy, or if the claim is to be sent to the Board of Veterans Appeals. If the recording of the hearing is not transcribed, the recording of the hearing is placed in the claims folder so that if the hearing needs to be transcribed later, the tape or other recording medium is available. The current procedures adequately protect the claimant's interests while providing VA with greater efficiency in using our resources. We propose to make no changes based on this comment.

One commenter urged VA to require in § 5.82(d)(3) that adjudicators conducting hearings make express credibility findings on the record concerning the sworn, personal hearing testimony of claimants and other witnesses. The commenter averred that VA hearing officials deciding claims regularly fail to state the reasons for rejecting sworn hearing testimony. The commenter asserted that a requirement that hearing officers make specific credibility findings is necessary to compel hearing officers

to include the contribution of his or her assessment of the credibility of hearing testimony in the statement of reasons for a decision.

We decline to make this suggested addition. Such findings are already required by initially proposed § 5.83(a), which requires VA to send each claimant a decision that explains, "[if] a claim is not fully granted, the reason for the decision and a summary of the evidence considered . . . ." Additionally, if VA were to specifically require VA personnel conducting hearings to determine the credibility of oral hearing testimony, the requirement could be misconstrued as emphasizing that type of testimony over others, or that they need not make credibility findings on other types of testimony or evidence. A finding as to credibility of testimony, or of any evidence, is fundamental to all weighing of evidence. See Barr v. Nicholson, 21 Vet. App. 303, 310 (2007) ("On remand, the finder of fact must consider the credibility and weight of Mr. Barr's statement, and any other competent lay or medical evidence"); see also, Layno v. Brown, 6 Vet. App. 465, 469 (1994) (Credibility is a matter to consider after evidence or testimony has been admitted). We agree with the commenter's statement that testimony is evidence, and that the Secretary must consider "all information and lay and medical evidence of record". 38 U.S.C. 5107(b) (Benefit of the doubt). That does not mean that regulation must specifically require credibility findings as to hearing testimony. The lack of a finding of credibility of hearing testimony, as with a failure to assess the credibility of any testimony or evidence, can be the basis on appeal of an assertion that VA failed to state its reasons or bases for a decision. We propose to make no changes based on this comment.

Initially proposed § 5.82(e)(1) stated, “Normally, VA will not schedule a hearing for the sole purpose of receiving argument from a representative.” This was based on current 38 CFR 3.103(c)(2) which states, “The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative.” In reviewing § 5.82 to respond to comments, we noted that paragraph (e)(1) provides no guidance on when VA will schedule a hearing for the sole purpose of receiving argument from a representative. Title 38 CFR 20.700(b) states, in pertinent part, “Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member assigned to conduct the hearing.” We believe that applying a good cause standard to hearings at the agency of original jurisdiction would be fair to claimants and beneficiaries, and administratively efficient for VA, so we propose to add that standard to paragraph (e)(1).

We propose to reorganize initially proposed § 5.82(e)(3) (now renumbered as paragraph (e)(4)) to make clear that it addresses failure to report for a hearing under any circumstance. Paragraph (e)(4)(i) addresses failure to report without good cause Paragraph (e)(4)(ii) addresses failure to report with good cause and the responsibility of the claimant or beneficiary to request rescheduling.

One commenter urged VA to add a provision to § 5.82(e) on rescheduling hearings upon receipt of a reasonable request from a claimant or beneficiary. VA’s

long-standing practice has been to inform claimants and beneficiaries, in the letter scheduling their hearing, how to contact VA to reschedule the hearing. Based on the comment, we have added a new paragraph (e)(3) stating, "If a claimant or beneficiary is unable to attend a scheduled hearing, he or she may contact VA in advance to reschedule the hearing for a date and time which is acceptable to both parties."

Similarly, another commenter argued that VA should provide a claimant with a right to reschedule a hearing if the claimant missed the originally scheduled hearing for good cause. In our view, a request to reschedule is reasonable if the claimant failed to report for good cause. VA's long-standing practice has been that if a claimant fails to attend the hearing with good cause, VA will reschedule the hearing. We agree with the commenter that it would helpful to include this in paragraph (e) and we now propose to add such language.

We reviewed initially proposed § 5.82 in connection with this comment, and determined that it might be unclear whether the hearing procedures discussed in paragraphs (a) through (e) apply to "predetermination hearings" under paragraph (f). We propose to revise (f) by adding the word "Additional" before the paragraph heading. It now reads, "Additional requirements for hearings before proposed adverse actions." The paragraph provides that before VA takes adverse action regarding a benefit, VA will give the beneficiary notice of a right to a hearing, and that the beneficiary has 30 days to request a hearing. Reading the heading and the paragraph together makes it clear that the provisions of (f) modify the hearing procedures discussed in paragraphs (a)

through (e). The modifications consist of VA's unique notice requirement and the beneficiary's 30-day limit to request a hearing. See discussion of distinction between paragraphs (a) and (f), above.

We have restated the rule in initially proposed paragraph (f) regarding the conditions under which VA will hold a hearing prior to adverse action so it reads in the affirmative, rather than in the negative. That is, stating "VA will conduct a hearing . . . only if . . .", rather than, "VA will not conduct a hearing . . . unless . . . ." This change is consistent with part 5's preferred style of stating rules in the affirmative. We have also removed the second sentence of initially proposed paragraph (f)(1) providing examples of good cause for failing to report for a hearing. It is the same as the last sentence of paragraph (e)(3). Paragraph (e) provides the rights and responsibilities of the beneficiary regarding hearings generally. The provision need not be repeated in paragraph (f), which comprises hearing requirements in addition to those elsewhere in § 5.82.

One commenter noted that initially proposed paragraph (f)(3) requires that VA "send the notice of the time and place for the predetermination hearing at least 10 days before the scheduled hearing date" and urged that VA provide similar advanced notice for hearings conducted under paragraph (d). We agree with this suggestion. VA usually provides at least 10 days advanced notice of hearings, and we propose to revise paragraph (d) to provide the same 10 days notice as contained in paragraph (f).

One commenter urged VA not to use the term “predetermination hearing” in § 5.82(f), which describes hearings conducted after VA proposes to take some adverse action affecting benefits, but before rendering a decision. The commenter noted that a claimant may request a hearing at any time, including prior to the initial decision on a claim, which would also be a “predetermination hearing.” The commenter did not offer any suggestion as to what term VA should use in its place.

We agree that any hearing preceding a determination can accurately be called a “predetermination” hearing. The term “predetermination hearing” has been used in current regulation 38 CFR 3.105(i) for many years and is widely understood by VA adjudicators, veterans, and veterans’ representatives. It is clear in § 5.82(f) what the term means and we are not aware of any other term that would be more clear to readers. Nonetheless, it is jargon and not essential. A hearing is a hearing. The same rules apply to the conduct of the hearing described in paragraph (f) as to any other hearing. The decision maker must give the same consideration to the testimony and evidence presented as with any other hearing. The unique effect of a request for a hearing prior to a possible adverse decision is that VA will not reduce or discontinue the benefit payments prior to hearing. It is this relationship of the request for a hearing to the timing of any action resulting from the decision whether to reduce or discontinue a benefit that gave rise to the term “predetermination” hearing. This rule is in the last sentence of § 3.105(i)(1), and initially proposed § 5.82(f)(4) restated it. The rule applies regardless of whether the hearing has a special name. For consistency throughout § 5.82, and to avoid any confusion of the sort the commenter highlighted, we propose to

remove the modifying term “predetermination” prior to the term “hearing” in paragraph (f).

Initially proposed § 5.82(f)(3) stated that VA will send the notice of the time and place for a predetermination hearing at least 10 days beforehand and that this requirement may be waived by the beneficiary or representative. This 10-day notice provision is currently contained in 38 CFR 3.105(i). Three commenters asserted that this 10-day advanced notice period is often not adequate. They referred variously to the time it takes to deliver the mail, the distance a claimant or beneficiary must travel, and the time required to gather the funds or arrange for time off work to attend a hearing. One commenter urged VA to adopt a rule providing for “negotiated appointments acceptable to both parties, with at least 30 days’ notice unless otherwise agreed.”

Regarding the suggestion that we revise initially proposed § 5.82(f) to provide 30 days advanced notice of the date of the hearing; we decline to make this change. Ten days is sufficient time for beneficiaries to receive VA’s scheduling letter and, if necessary, to contact VA to reschedule. VA already has the inherent discretion to resolve situations where a beneficiary needs more time. For example, if VA’s letter arrived while the beneficiary was on vacation and the beneficiary was unable to reschedule before the hearing date, VA would reschedule the hearing when the beneficiary contacted VA. Second, we note that the 10-day provision has been contained in § 3.105(i) for over 15 years and there have been few, if any, complaints

from beneficiaries about this provision. For these reasons, we propose to make no changes based on this comment.

We propose to revise initially proposed paragraph (f)(4), removing the term "final" before "decision". The decision that follows a proposal to reduce or discontinue a benefit is not a "final" decision as VA defines "final" in § 5.1. Like any other decision on entitlement to benefits, it is subject to appeal and can become final by expiration of the time allowed to appeal the decision, or because the Board of Veterans' Appeals has ruled on an appeal from the decision. The decision to which paragraph (f)(4) refers is the type of decision described in § 5.160 as "binding". Compare preamble to § 5.160, with § 3.104(a) (final and binding decision).

In the NPRM, we initially proposed not to include in § 5.82 the last sentence of current § 3.103(c)(2). We stated in the preamble of the NPRM that the provision is redundant because 38 U.S.C. 5103A(d), enacted in 2000, requires VA to provide a medical examination if it is "necessary to make a decision on the claim". This § 5103A(d) examination or opinion provision is now § 5.90(c)(4)(i), which derives from § 3.159(c)(4).

One commenter objected to our proposal not to include the provision concerning a visual examination by a physician in part 5. The commenter stated that there is significant difference between a claimant's right to request a visual examination during a hearing and a claimant's right to request an examination under 38 U.S.C.

5103A(d). The commenter expressed the opinion that under current § 3.103(c)(2), a claimant has the right to have a VA physician "read into the record" the physician's relevant observations but under 38 U.S.C. 5103A(d) there is no guarantee that VA will grant a request for a VA examination. The commenter also noted that under VA's current regulation implementing 38 U.S.C. 5103A(d), 38 CFR 3.159, now § 5.90, VA does not provide examinations for veterans seeking to reopen denied claims. The commenter urged VA to revise § 5.82 to authorize a visual examination by a physician.

Initially, we note that the claimant did not have a right to have a VA physician "read into the record" the physician's relevant observations, but could request a visual examination by a physician. Provision of the visual examination was at the discretion of the VA. The portion of the regulation providing for a visual examination by a physician at a hearing was included in the regulation at a time when the regional offices had physicians (medical members) on the staff, usually as part of the rating board. At that time, the medical member would either attend the hearing or be available nearby within the regional office if needed to conduct the visual examination. Regional offices rarely have a medical member on rating boards any more. Few regional offices have the capability of providing the visual examination by a physician at the hearing location. The provision for a visual examination during the hearing is an anachronism and no longer practical.

Additionally, while there is no "guarantee" that VA will grant a request for a VA examination, the language of 38 U.S.C. 5103A(d) ("necessary to make a decision on

the claim") provides sufficient assurance that VA will obtain needed medical examinations. If an examination is necessary to make a decision on the claim, one will be scheduled. If an examination is not necessary to make a decision on the claim, a visual examination at a hearing would be unlikely to assist the claimant. We also note that in most cases, it is preferable to have a claimant examined by a physician in a medical office (where testing equipment and privacy is available), rather than in a hearing room at a VA regional office. For these reasons, we propose to make no changes to initially proposed § 5.82 based on this comment.

Regarding the commenter's suggestion that VA revise current §§ 3.159 or 5.90 to require VA to provide examinations for veterans seeking to reopen denied claims, this suggestion was made in comments submitted during the initial promulgation of § 3.159. VA declined to make such a change, because it would not be an appropriate "expenditure of its finite resources" to do so. For the reasons stated in that rulemaking (66 FR 45628 (August 31, 2001)), we decline to revise § 3.159 or its part 5 counterpart, § 5.90.

§ 5.83 Right to Notice of Decisions and Proposed Adverse Actions.

One commenter asserted that the use of the phrase, "the payment of benefits or the granting of relief" could be interpreted as more narrow than the provision in 38 U.S.C. 5104(a), which reads, in pertinent part, "[i]n the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and the claimant's

representative) notice of such decision." The commenter urged VA to replace the phrase "the payment of benefits or the granting of relief" with "the provision of benefits".

We disagree that the phrase "the payment of benefits or the granting of relief" would permit VA not to give notice of decisions of which it would have to give notice if the regulation used the statutory language. The proposed language is taken verbatim from 38 CFR 3.103(b)(1) and is well understood to include VA decisions that involve monetary benefits and those that do not. Switching to the statutory language "provision of benefits" could be misinterpreted to mean only decisions involving monetary benefits. We therefore decline to make the change suggested by this commenter.

The same commenter also noted that the use of "proposed adverse action" in paragraph (a) was confusing. The commenter urged VA to strike the reference to proposed adverse actions and revise the second sentence of paragraph (a) for clarity.

In reviewing initially proposed § 5.83 in response to this comment, we have determined that paragraphs (a) and (b) should be reorganized for clarity. We have restructured these paragraphs so that (a) covers only notices of proposed adverse actions and (b) covers only notices of decisions. Consistent with this structure, we have listed the elements which are contained in each type of notice.

Another commenter stated that initially proposed § 5.83(b) (redesignated as paragraph (a)) would reduce the time VA allows to submit evidence from 1 year to 60

days, which is disadvantageous to veterans. The commenter apparently has mistaken the time VA allows for a beneficiary to submit evidence in response to a notice of a proposed adverse action with the time VA allows for a claimant to submit evidence in support of a claim for benefits. Compare 38 CFR 3.159(b) with 38 CFR 3.103(b)(2). Initially proposed § 5.83 is based on § 3.103, which also states that the time period for a claimant to submit evidence in response to a notice of adverse VA action is 60 days. Therefore, we propose to make no changes based on this comment.

In responding to these comments, we determined that the initially proposed rules failed to explain our omission of the substantively identical provisions found in paragraphs (d), (e), (f), and (h) of 38 CFR 3.105, which state that before notice of a proposed adverse action is sent to a beneficiary, "a rating proposing severance will be prepared setting forth all material facts and reasons." We believe that these provisions confer no rights or duties and relate purely to internal agency procedures, so it is not necessary to include them in VA's regulations. The due process guarantee of advance notice contained in the second sentences of those paragraphs is included in proposed § 5.83(a).

§ 5.84 Restoration of Benefits Following Adverse Action.

One commenter asserted that both the current and proposed rules were "contrary to law" because they imposed a 30-day deadline in which the beneficiary is required to contest the decision in order for VA to retroactively restore benefits. The commenter noted that under 38 U.S.C. 7105(b)(1), a beneficiary has 1 year to initiate a

corrective action for an erroneous decision or action by VA. This would be done by filing a Notice of Disagreement with the VA decision. The commenter also asserted that "any action based on nonexistent facts or false information provided by a third party would be void ab initio [from the beginning], and there is no time limit for requesting corrective action," citing 38 U.S.C.A. 5109A(b) and 38 CFR 3.105(a). The commenter also noted that 38 CFR 3.156(b) and 3.400(q) require that when VA reverses a decision on appeal, the effective date will be set as if the decision had not been rendered.

We agree with the commenter that 38 CFR 3.156(b) and 3.400(q) require that when VA reverses a decision, the effective date will be set as if the decision had not been rendered. The intent of § 3.103(b)(4) (see 66 FR 20220 (Apr. 20, 2001)) for an explanation of the intent of this section) was not to deprive beneficiaries of the proper effective date for restoration of benefits nor has VA applied the rule so as to limit the rights of beneficiaries in this manner. Rather, § 3.103(b)(4) serves the purpose of allowing VA to reverse an erroneous decision without requiring the beneficiary to file a Notice of Disagreement. This relieves the beneficiary of the burden of preparing and filing a written Notice of Disagreement (including the elements required under 38 CFR 20.201, "Notice of Disagreement"). The process under § 3.103(b)(4) does not replace the appeal process described in 38 U.S.C. 7105. Rather, it provides a convenient and more efficient alternative means for beneficiaries to have their benefits restored. We therefore disagree that current § 3.103(b)(4) or initially proposed § 5.84 is contrary to law.

However, in order to avoid any confusion that initially proposed § 5.84 limits the rights of beneficiaries as described above, we are adding the following language as a new paragraph (a)(2), "[t]his paragraph (a) does not limit the right of a beneficiary to have benefits retroactively restored based on evidence submitted within the 1-year appeal period under § 5.153, 'Effective date of awards based on receipt of evidence prior to end of appeal period.'"

Also to avoid confusion, we have inserted the word "written" before "information" in § 5.84 to distinguish that term from "oral statements".

§ 5.90 VA Assistance in Developing Claims.

In the NPRM, we stated:

> Title 38 CFR 3.159 is currently the subject of a separate VA rulemaking which will implement changes made by section 701 of Pub. L. 108-183, 117 Stat. 2670. When that rulemaking is complete, we plan to repeat the language of the amended § 3.159 as § 5.90. We therefore propose in this rulemaking to reserve space for proposed § 5.90.

(70 FR 24683 (May 10, 2005))

VA has published the final rule amending 38 CFR 3.159 and we are now inserting the current language of § 3.159 as § 5.90 (RIN 2900-AM17, "Notice and Assistance Requirements and Technical Correction", 73 FR 23353, Apr. 30, 2008, with amendment 73 FR 24868, May 6, 2008; based on § 3.159). We propose to remove the definitions of competent medical evidence and competent lay evidence, revise the definition of competent expert evidence, and place the definitions in § 5.1. We have

reorganized § 5.90 accordingly and changed the references to part 3 regulations to refer to part 5 regulations.

In addition to the provisions of § 3.159, we propose to include in § 5.90 the provisions of current § 3.109(a). These provisions relate closely to the other provisions in § 5.90 and so it is logical to move them into that rule. However, we propose to clarify the sentence, "Information concerning the whereabouts of a person who has filed a claim is not considered evidence" in § 5.90(b)(3). This sentence means that if a claimant submits information or evidence concerning his or her mailing address, that is not considered information or evidence under paragraph (b). We propose to revise the sentence accordingly to clarify its meaning. The only other change we propose is that we have simplified the scope sentence stated in § 3.109(a)(2) so that it simply says that the rule applies to all part 5 applications.

Subsequent to the publication of proposed § 5.90, section 504 of Public Law 112-154 (2012) amended 38 U.S.C. 5103 by removing the requirement that a claimant submit "a complete or substantially complete application" as a prerequisite to VA providing notice of information and evidence needed to substantiate the claim. Section 504 also amended §5103 to relieve VA of the requirement to provide such notice "to any claim or issue where the Secretary may award the maximum benefit in accordance with this title based on the evidence of record." We propose to include these statutory changes § 5.90.

Section 505 of Public Law 112-154 (2012) extensively amended 38 U.S.C. 5103A regarding VA's duty to assist claimants. VA plans to conduct a rulemaking to implement § 505 in part 3 and will incorporate those part 3 regulations into part 5.

§ 5.91 Medical Evidence for Disability Claims.

One commenter urged VA to replace the word "may" with "shall," concerning the acceptance of private medical evidence, because this would be consistent with the Congressional intent behind 38 U.S.C. 5125. Although that statute uses the word "may," the commenter asserts that Congress meant to give VA authority to accept private medical examination reports in place of VA examination reports, but that once VA has determined to accept such private reports generally, it cannot accept or reject such reports "on a whim". The commenter asserted, "[s]uch unwarranted discretion defeats the very purpose of the rule."

We disagree that Congress' intent was merely to give VA authority to accept private medical examination reports generally. Rather, the plain language of 38 U.S.C. 5125 allows VA discretion to accept or reject such evidence in each individual case. We do not agree that this process defeats the purpose of the rule. This process allows VA the necessary discretion to reject private reports which, although technically "adequate for purposes of adjudicating a claim", VA considers to be potentially biased or unreliable. We therefore decline to make the change suggested by this commenter.

Another commenter suggested that VA revise § 5.91 to require VA regional offices to "give a clear and precise explanation for why the claimant's medical evidence is not sufficient to render a VA examination unnecessary." We decline to adopt this suggestion because such an explanation would be of little use to claimants. VA has a duty to make reasonable efforts to obtain the evidence necessary to properly decide each claim. In addition to the medical evidence provided by the claimant, VA will schedule a VA examination if one is "necessary to decide the claim." See 38 U.S.C. 5103A. See also § 5.90. VA obtains evidence from multiple sources in most cases and it would be unduly burdensome, and a waste of resources, for VA to be required to explain why it has obtained every piece of evidence. VA is required to explain the reasons for any decision adverse to the claimant and to include a summary of the evidence considered in making the decision on the claim. See 38 U.S.C. 5104. See also § 5.83. These procedures adequately inform the claimant of the relative probative value to any medical evidence submitted and we propose to make no changes based on this comment.

§ 5.92 Independent Medical Opinions.

In initially proposed § 5.92 we repeated the content of current 38 CFR 3.328 without change.

One commenter expressed concern that § 5.92 could be confusing by implying that VA will obtain independent medical opinions in place of VA medical examinations. We do not agree and we propose to make no changes based on this comment. Initially

proposed § 5.92 did not state or imply that we would not comply with the provisions of § 3.159. The evidence obtained under the provisions of § 5.92 will generally supplement the other medical evidence with an independent medical opinion "[w]hen warranted by the medical complexity or controversy".

Another commenter noted that § 5.92(a) gave VA authority to obtain an independent medical opinion when "warranted by the medical complexity or controversy" while paragraph (c) stated that, in order for VA's Compensation and Pension Service to approve requests for such opinions, the claim must pose "a medical problem of such obscurity," complexity, or controversy. We agree that it would be logical to state the criteria for such opinions using the same terminology in both paragraphs and we have removed the word "obscurity" from paragraph (c). Both paragraphs now use the language used in the authorizing statute, 38 U.S.C. 5109.

Another commenter urged VA to revise § 5.92 to require that VA provide claimants with copies of all communications between the VA regional office and the institution providing the independent medical opinion. The commenter asserted that, "[s]uch a requirement for openness . . . will ensure the fairness and integrity of this new procedure."

As a preliminary matter, we note that the procedure to obtain an independent medical opinion is not new and has been contained in § 3.328 since 1990. See 55 FR 18602 (May 3, 1990). VA is required by 38 U.S.C. 5109 to furnish the claimant with

notice that an advisory opinion was requested and also a copy of the opinion when it is received by VA. See § 5.92(d). Furnishing the notice of the intent to request the independent medical opinion and a copy of the opinion to the claimant sufficiently advises the claimant of the status of the independent medical opinion request and results. We do not believe that it is necessary to furnish the claimant with notice or a copy of every communication VA may have with the individual or organization preparing the independent medical opinion. Such communications as a telephone call or an electronic mail message to clarify a typographic error or other minor issues would not assist the claimant in the presentation of the claim. Additionally, records of these communications may be obtained by the procedures discussed earlier concerning the procedures for a claimant to obtain copies of evidence. We propose to make no changes based on this comment.

One commenter urged VA to include a provision in § 5.92(d) allowing a claimant a specified period of time to respond to an independent medical opinion that is adverse to the claimant. We do not believe this change to be necessary because, at the time that VA is seeking the independent medical opinion, the claimant is informed that the independent medical opinion is being sought and also what specific information is being sought. This provides the claimant ample time and opportunity to seek, obtain, and submit their own independent medical opinion should they wish to do so. We also note that once the claimant receives a copy of the independent medical opinion, even if the claim has been denied, he or she has the opportunity to respond. We propose to make no changes based on this comment.

§ 5.93 Service Records Which are Lost, Destroyed, or Otherwise Unavailable.

One commenter asserted that the force of § 5.93 is diminished due to the confusing use of terminology. The commenter argued that the phrase, "alternative evidence" should be replaced with, "evidence from alternative sources." Upon review of the regulation, we propose to change the regulation according to the commenter's suggestion. As noted by the commenter, the evidence sought may be a copy of the missing evidence, not alternate evidence.

§ 5.99 Extensions of Certain Time Limits

In the AL82 NPRM, we inadvertently failed to include provisions contained in current 38 CFR 3.109(b). We are doing so now in § 5.99. This rule restates § 3.109(b) without substantive change. We are clarifying in § 5.99(c) that while late requests for extensions will be permitted under some circumstances, as is currently the case, no extension of time will be granted after VA has made a decision on the claim to which the information or evidence relates and the time to appeal that decision has expired.

§ 5.100 Time Limits for Claimant or Beneficiary Responses.

One commenter felt that VA should specify that the holidays referenced in the regulation are Federal holidays. We agree and have added the word, "Federal" before holidays in § 5.100(a).

One commenter felt that this regulation should specify whether the date of mailing or the date of receipt by VA would be the ending date of the applicable time period provided to a claimant to respond to a VA communication. We propose to make no changes based on this comment. This regulation is intended to specify how to calculate a time limit. Within part 5, where a response is required to be submitted within a certain time, all the sections specify how the ending date of the applicable time period provided to a claimant will be calculated. This is generally the date of receipt by VA of whatever evidence or information is requested, if received within the applicable time period. To include the ending date information here would be redundant.

One commenter felt that VA should revise this regulation since the commenter felt that sometimes a VA letter may be signed after the last mail pickup for that day. The letter would not actually be mailed until the following workday. The commenter felt that this rule provided for a "convenient and arbitrary assumption that disfavors claimants." A second commenter agreed, stating that the word "considered" should be removed from the second to last sentence in order to avoid having VA rely on a date that it may know to be erroneous.

We propose to make no changes based on this comment. This regulation provides that the first day of the specified time period will be excluded in computing the time limit for any action required of a claimant. This ensures that the claimant is generally provided the full time period. Additionally, the time periods provided allow ample time for the claimant to respond. While it is true that the 1-day grace period

provided by not counting the date of the letter in the time period does not provide for those situations where the letter is dated on a Friday afternoon, but not actually posted until Monday, the claimant still has been provided sufficient time to respond to any requests for information or evidence.

One commenter urged VA to adopt a system of notice for determining the time periods for claimants or beneficiaries' responses similar to that found in 41 U.S.C. 609(a)(3), which provides that the period of time begins running when the notice has been received. VA currently begins the period of time from the date of mailing as shown by the date of the letter sent to a claimant or beneficiary. The commenter felt VA could better afford the minor expense of certified mail than could the claimant or beneficiary.

VA communicates with claimants and beneficiaries at various stages in the adjudication process, using various means. It would not be appropriate to regulate the manner of all such communications because VA needs discretion to use the most effective means of communications and because such means may change over time. Additionally, VA routinely sends hundreds of thousands of pieces of mail to veterans, claimants, and beneficiaries, as well as their representatives. While the burden for sending any one piece of mail by certified mail is small, the expense and time required to send all notices by certified mail would be overwhelming, both in increased monetary cost and human resources expended. Routinely sending certified mail to veterans, claimants, or beneficiaries is not necessary, nor, in most situations, helpful to the

veterans, claimants, or beneficiaries. VA provides sufficient time for a veteran, claimant, or beneficiary to respond to the communications we send them. It is not burdensome for the veteran, claimant, or beneficiary to respond, when necessary, within the time limits specified in the communication. The additional two or three days that would be provided by starting the time period from date of receipt instead of date of mailing would rarely assist a veteran, claimant, or beneficiary. For these reasons, we decline to make any changes based on this comment.

§ 5.101 Requirement to Provide Social Security Numbers.

Initially proposed § 5.101 explained the statutory requirement that claimants and beneficiaries must provide VA with their Social Security numbers and their dependents' numbers.

One commenter urged VA to excuse those claimants or beneficiaries who, for good cause, fail to provide their Social Security number. The commenter urged that, if VA reduces or discontinues benefits, it should resume the benefits retroactively from the effective date of the reduction, if the person had good cause for the failure.

We note that, as stated in initially proposed § 5.101(f), "A claimant or beneficiary is not required to provide a Social Security number for any person to whom a Social Security number has not been assigned." Other than this, we are unaware of any reason which would constitute good cause for a claimant or beneficiary failing to

provide VA with his or her Social Security number, nor does the commenter offer any such example. We therefore propose to make no change based on this comment.

Initially proposed § 5.101(d) stated, "[i]f a claimant or beneficiary provides VA with the requested Social Security number, VA will resume payment of benefits at the prior rate, effective on the date VA received the Social Security number, provided that payment of benefits at that rate is otherwise in order." One commenter noted that under paragraph (d), if a claimant or beneficiary failed to furnish the required Social Security number within the deadline but later provided it, VA would pay benefits only from the date it received the Social Security number. The commenter noted that § 5.101 would treat claimants and beneficiaries disparately in that if they ultimately provided VA their Social Security number, the former would have benefits granted from the date of claim, while the later would have benefits restored only from the date he or she provided the number. The commenter objected to this disparate treatment, asserting:

> When a claimant receiving benefits is requested to provide a social security number and does not promptly comply, VA may certainly administratively suspend payment ('terminate the payment') of benefits pursuant to § 5101(c), but the benefits should be resumed effective the date of suspension if the requested information is provided within 1 year. Such a rule would be consistent with the time an applicant has to provide the social security number under sections 5102(c) and 5103(b) and the general rule in 38 CFR 3.158 (2004) that a claim will be considered abandoned only if the requested information is not provided within 1 year.

The commenter asserted that this rule would be contrary to 38 U.S.C. 5102 and 5103, which do not explicitly authorize VA to reinstate benefits only from the date a beneficiary ultimately provides VA his or her Social Security number. In reviewing paragraph (d) in response to this comment, we noted that VA cannot "resume"

payments to a claimant, since VA has not begun paying such a person. We therefore propose to remove the term “claimant” from this paragraph, so that it would relate only to beneficiaries and not to claimants.

Regarding the disparity noted by the commenter, we first note that it is not inconsistent with the relevant statutes, 38 U.S.C. 5101-5103. Sections 5102-5103 only cover claims, not running awards, so they are not germane to the disputed provision. Section 5101(c)(2) states that “the Secretary shall deny the application of or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a social security number required to be furnished pursuant to paragraph (1) of this subsection. The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such social security number.”

This statute, and its implementing regulation 38 CFR 3.216, leave a gap regarding the effective date for the reinstatement of benefits. VA’s long-standing practice has been to resume benefits effective the date the beneficiary ultimately provides the social security number. If the rule were changed as the commenter urges, VA would in such cases have to make retrospective determinations, in some cases going back many years, on whether the former beneficiary actually met all the entitlement criteria for the benefit during the entire retroactive period. This would consume considerable VA resources when compared with the rule proposed in § 5.101(d). Furthermore, there is no indication that our proposed rule creates a hardship

for beneficiaries. For these reasons, we propose to make no change based on this comment.

Initially proposed § 5.101(e), entitled, "Claimant's application for VA benefits", stated, "[i]f 60 days after VA requests a Social Security number, the claimant fails either to provide the requested Social Security number or to show that no Social Security number was assigned, VA will deny the claim." One commenter objected to this provision, noting that it did not include a provision allowing a claimant 1 year to submit his or her Social Security number. The commenter noted that 38 U.S.C. 5102 and 5103 allow a claimant 1 year to provide the information needed to complete an application. The commenter noted that while VA has the authority to deny the application earlier than the expiration of the 1 year period, if the information is received no later than 1 year after VA's request, VA must reconsider the application as if the information had been furnished on the application.

After reviewing the applicable statutes and VA's other regulations, we agree with the commenter that it would be appropriate to clarify that a claimant has 1 year in which to submit the requested Social Security number. We therefore propose to add a sentence to § 5.101(e), based on a provision from § 5.90(b)(1)(i) (based on current 38 CFR 3.159(b)(1). This new sentence states, "[i]f VA denies the claim or denies benefits for the dependent, and the claimant subsequently provides the Social Security number no later than 1 year after the notice, then VA must readjudicate the claim."

In making this proposed change based on the comment, we noted that the 60-day deadline in 38 CFR 3.216 applies only to beneficiaries, not to claimants. In order to be consistent with § 5.90(b)(1)(i), we propose to revise the 60-day period in § 5.101(e) to 30 days. In addition to being consistent with § 5.90(b)(1)(i), we believe that 30 days is sufficient time for claimants to provide VA with requested Social Security numbers.

Subsequent to the publication of proposed § 5.101, section 502 of Public Law 112-154 (2012) amended 38 U.S.C. 5101 by adding a new paragraph stating if an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed under paragraph (1) for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form. The term `mentally incompetent' with respect to an individual means that the individual lacks the mental capacity—

- to provide substantially accurate information needed to complete a form; or
- to certify that the statements made on a form are true and complete.

Section 502 also added Taxpayer Identification Number (TIN) to the Social Security number requirement in § 5101. We have updated § 5.101 to reflect these statutory changes.

§ 5.103 Failure to Report for VA Examination or Reexamination.

The preamble to initially proposed § 5.103 stated that part 5 would not repeat § 3.655(a) because it is unnecessary. 70 FR 24680, 24685, (May 10, 2005). To clarify, that statement correctly applies only to the first sentence of § 3.655(a). The examples of good cause in § 5.103(f) derive from the second sentence of § 3.655(a).

One commenter felt that the examples provided in the regulation to determine what constitutes "good cause" for failure to report for a scheduled VA examination were too narrow and may lead VA to apply too high a standard to determine what constitutes "good cause".

The examples of "good cause" for failure to report for a scheduled VA examination in initially proposed § 5.103(f) are the same examples included in the full revision of § 3.655(a), effective December 31, 1990. 55 FR 49520, Nov. 29, 1990. The last sentence of § 5.103(f) is new and requires that VA consider each reason given for missing a VA examination on a case-by-case basis. Use of the examples that have been in place since 1990, together with the last sentence, ensures that determinations concerning whether the veteran had "good cause" for not reporting to the examination will not change. We propose to make no changes based on this comment.

One commenter recommended not repeating § 3.655 in part 5. We disagree because if VA did not repeat this rule, there would be no rule about how to proceed with

adjudication if a claimant fails to report for an examination that VA has concluded is necessary to decide the claim. The commenter did not state how it would benefit claimants or VA to do without it. Omission of this rule would risk disparate treatment of claimants with similar claims. Avoiding disparate results in similar situations is an important object of regulations. To promote this objective, VA will repeat the rule in part 5.

The same commenter recommended, alternatively, significantly revising the regulation to eliminate several problems he said it has. The commenter asserted there is no logical reason to distinguish between original and other claims. We interpret the comment to mean that VA should treat a failure without good cause to report for a VA examination the same whether the examination is for an original disability compensation claim or for any other claim.

Before 1991, § 3.655 was silent about VA examinations in original disability compensation claims. 38 CFR 3.655 (1990). It applied only to rating action to be taken upon a failure to report for examination of a beneficiary with an ongoing award of benefits, providing for discontinuance of payments. See Wamhoff v. Brown, 8 Vet. App. 517, 520 (1996) (discussing historical § 3.655). VA amended § 3.655 in 1990 to include the requirement to report for VA examination (formerly in § 3.329, which it rescinded) and to provide for unique treatment of original disability compensation claims upon the claimant's failure to report for examination.

There are good and practical reasons to treat the failure to report for an examination in an original claim for disability compensation differently than in other claims. Establishing that a disability is service connected is an element of an original claim for disability compensation that precedes determination of the severity of disability. See Barrera v. Gober, 122 F.3d 1030, 1032 (Fed. Cir. 1997) (explaining "up stream" and "down stream" elements of veterans benefits claims); Grantham v. Brown, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997). Evidence sufficient to decide whether a disability is service connected is likely to be of record without the examination, for example, in the case of a battlefield amputee or a veteran who contracted a presumptively service-connected chronic disease. Even though the evidence of record might be uninformative about the current extent of disability, it is practicable and efficient to decide such a claim on the evidence of record without the examination, even at the risk of an imprecise initial rating. In contrast, current medical information is likely to be lacking and indispensable to deciding the other types of claims named in the regulation.

The predicate for ordering an examination is that the information to be gained from it is necessary to establish entitlement or confirm continued entitlement to a benefit. In other words, if VA has determined that it cannot decide a claim, or an element of a claim, without the evidence derived from the examination, it would squander resources valuable to the entire veteran community to adjudicate the claim, and it preserves resources to deny the claim upon failure to report for the examination

without good cause. We therefore propose to not make any changes in response to this comment.

The object of a VA examination in an original disability compensation claim could be to address one of the elements of proof of service connection, see § 5.243, "Establishing service connection for a current disability.", to ascertain the current severity of disability (a determination VA initially makes upon finding that a disability is service connected), or both. Though the examination could be indispensable to making the most accurate current rating, the benefit to the claimant and practicality of deciding the service-connection element of the claim warrants the unique treatment of original compensation claims.

The same commenter asserted the distinction between types of claims invites fraud. The commenter did not explain how the distinction would invite fraud. We propose to make no changes based on this comment.

The same commenter noted that we had not defined the terms, "other original claim" and "new claim." The commenter noted that neither term is found in the applicable statutes. The commenter felt this section should be revised so that the terms are understood by claimants and so that the terms fit within the regulatory framework.

In § 5.57, we defined several types of claims. We defined "original claim" in § 5.57(b) as "the first claim VA receives from an individual for disability benefits, for death

benefits, or for monetary allowance under 38 U.S.C. chapter 18." Although not defined in the statutes, the term "original claim" is found in 38 U.S.C. 5110 and 5113. Consistent with how the term is used in current 38 CFR 3.655(b), our use of "other original claim" was intended to mean any original claim arising under part 5 other than an original disability compensation claim. This would include, for example, a claim for a monetary allowance based on spina bifida under 38 U.S.C. chapter 18. We believe that when read in conjunction with § 5.57(b), this term is logical and understandable.

We have not defined the term "new claim". Based on this comment, we are removing the term from § 5.103(b)(2). We have determined that the term is not needed to assist the reader in understanding what is intended by this regulation.

In addition to the comment about specific terms, the commenter asserted that VA should revise the regulation so its terms are understandable to laypersons and "fall within the rest of the regulatory framework." The commenter further asserted that the regulation does not fit within the existing statutory framework and opinions of the [VA] General Counsel. The commenter did not explain how the regulation fails to fit within VA's statutory or regulatory framework or cite any precedent opinion of the General Counsel that the regulation violates. Consequently, we do not find anything in this comment to which VA can respond, and we propose to make no changes to the regulation in response to it.

Finally, the commenter recommended an “escape clause” that precludes “endless good cause.” The object would be to permit VA to decide a claim after a year if a claimant fails to report for an examination for a good cause of indefinite duration, such as being in a coma. The commenter suggested that the regulation should provide for VA to reschedule an examination missed for good cause if that good cause ends within 1 year. We construe the commenter to mean that if the good cause for failure to report for a VA examination persists for more than a year after the date of the examination appointment the claimant did not keep, VA would decide the claim on the evidence of record.

We will not add the suggested provision for five reasons. First, the suggestion would abrogate the distinction between original disability claims and other claims. Whether the claimant failed to report for good cause or no cause, without the examination that VA determined is necessary to decide a claim (other than an original disability compensation claim), the status of the evidence would still be such that VA could not grant the claim without the examination. Second, it is to the advantage of a claimant to suspend the claim until the contingency that prevented the claimant from reporting for the examination is removed, because it leaves the claimant in control of his or her claim. Third, there is negligible cost or burden to VA to suspend adjudication while the good cause of the claimant’s inability to report for an examination persists. Fourth, there is no advantage to VA to decide a claim it has determined lacks crucial evidence. Deciding a claim sooner rather than later under these circumstances is not sufficient reason for the rule the commenter suggests. The failure to report for an

examination for good cause is not like the failure to submit requested evidence that VA may consider abandonment of a claim. § 5.136, "Abandoned claims". Finally, the claimant can always eliminate the need for a VA examination by submitting other medical reports sufficient to serve as a VA examination. § 5.91(a), "Medical evidence rendering VA examination unnecessary." If the claimant submits a medical report that VA accepts as adequate to the needs of the claim, the examination for which the veteran cannot report would cease to be one necessary to establish entitlement to the benefit claimed. The question of how VA should respond to a failure to report for a necessary VA examination for good cause would be moot.

In reviewing initially proposed § 5.103, we noted that the last two sentences of paragraph (d)(1) stated, "The letter [proposing to reduce or discontinue benefits] must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary's procedural rights. See §§ 5.80 through 5.83." We believe it would be more precise to refer the reader to the procedural rights which are listed in such a letter. We therefore propose to restate the sentences as "The notice must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary's procedural rights as listed in § 5.83(a)(1) through (4)."

In responding to these comments, we noted that the initial NPRM failed to explain our addition of the third sentence of § 5.103(a): "If a claimant or beneficiary, with good cause, fails to report for a VA examination or reexamination, VA will reschedule the examination or reexamination." Though §§ 3.326(a) and 3.327(a) provide for

scheduling VA examinations, and § 3.655 prescribes VA action upon a claimant's failure to report for a necessary examination without good cause, nothing in part 3 specifically states that VA will reschedule an examination a claimant missed with good cause, which is VA's standard procedure. We propose to set forth this important point in paragraph (a).

§ 5.104 Certifying Continuing Eligibility to Receive Benefits.

In initially proposed § 5.104(c), we removed the reference to the effective date provisions. In part 5, the effective date provisions are not contained within one regulation, but are located with the regulation concerning the benefit to which the provisions apply. To include these provisions would result in an extremely long and complex paragraph which would not be helpful to the claimants or beneficiaries.

Changes in Terminology for Clarity and/or Consistency

The changes in terminology in this final rulemaking are made primarily for purpose of achieving consistency throughout our part 5 regulations. We replaced the word "evaluation" with "rating;" the term "on behalf of" with "for" or "to or for" where appropriate; and the word "notify" with "send notice to". As noted earlier, we are removing the modifying term "predetermination" prior to the term "hearing".

General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings AM01

In a document published in the Federal Register on May 22, 2007, we proposed to amend Department of Veterans Affairs (VA) regulations governing general evidence

requirements, effective dates, revision of decisions, and protection of existing ratings, to be published in part 5. 72 FR 28770, May 22, 2007. We provided a 60-day comment period that ended July 23, 2007. We received submissions from five commenters: Paralyzed Veterans of America, Vietnam Veterans of America, Disabled American Veterans, and two members of the general public.

§ 5.130 Submission of Statements, Evidence, or Information Affecting Entitlement to Benefits

We propose to revise and reorganize initially proposed § 5.130 for clarity. We propose to add the word "claimant" to the regulation to accurately reflect that this regulation covers submissions by both claimants and beneficiaries. Proposed § 5.130 was derived from § 3.217, which was originally issued to permit modification of existing awards based on electronic and oral reporting of changes, including, but not limited to, income and dependents. See 66 FR 20220, Apr. 20, 2001. The reference to "beneficiary" reflects that original, limited purpose. However, given the broad language of the regulation and our stated intent to cover all types of submissions, we are explicitly including claimants. All claimants and beneficiaries, or their representatives or fiduciaries, must meet all requirements of this section, such as using a specific form providing specific information, providing a signature, or providing a certified statement.

The initially proposed rule referred to "other electronic means" of submissions. We propose to add "that the Secretary prescribes" in paragraphs (a)(1) and (b)(1), to clarify that VA will determine the means or medium of submission it will accept.

Additionally, this phrase allows for technological changes over time.

Whereas the initially proposed regulation did not address claimants, it did not distinguish between them and beneficiaries. We propose to revise the regulation to distinguish between the media that claimants may use to file statements, evidence, or information, and the media that beneficiaries may use. VA currently accepts e-mail and oral submissions only from beneficiaries, not from claimants. As revised, paragraph (a) would address submissions from claimants and provide the acceptable media for those submissions. Paragraph (b) would address submissions from beneficiaries and allow submissions, either orally or by e-mail. Paragraph (b)(4) would prescribe VA action upon receipt of an oral statement.

One commenter questioned why we used the word “may” instead of “will” when referring to how VA will use verbal information provided by a beneficiary or fiduciary. We explained in the preamble to the proposed rule that the word “may” was more accurate because “VA may determine that the information or statement needs to be verified through other means”. However, the commenter pointed out that VA will use the evidence, even if it is just to “initiate an investigation to . . . confirm and continue an existing award”, or to contradict prior evidence. We agree with the commenter as the comment applies to the proposed use of “may” in proposed paragraphs (c)(1)(iii) and (2)(v). We propose to change “may” to “will” in redesignated paragraphs (b)(4)(iii) and (iv)(E). We have also decided that the phrase “VA may take action” used in proposed paragraph (b) is more accurately stated as “VA will take appropriate action”, and

propose to make this change accordingly. That is because whether VA takes any action that affects entitlement to benefits and what type of action it will take will depend on the content of the submission.

We also propose to change "affecting the [claimant's or beneficiary's] entitlement to benefits based upon" to "in response to". This is because a submission might not affect entitlement to benefits. The entire clause now reads, "VA will take appropriate action in response to the statement, evidence, or information." We have made this change, and the change discussed in the preceding paragraph, in paragraphs (a)(3) and (b)(3), which are parallel provisions applying to claimants and to beneficiaries, respectively.

Based on this comment, we have also decided that it would be more accurate to say that VA will use the statement described in proposed paragraphs (b)(4)(iii) and (iv)(E) "to determine entitlement" as well as "to calculate benefit amounts". Accordingly, we propose to add the phrase "to determine entitlement" in those paragraphs as redesignated. We also propose to revise this sentence from passive voice to active voice.

Initially proposed § 5.130 used the term "form". This term is no longer used in part 5. For consistency, we propose to change the term from "form" to "application", which is currently defined in § 5.1.

Initially proposed § 5.130(a)(1) stated:

> It is VA's general policy to allow submission of statements, evidence, or information by e-mail, facsimile (fax) machine, or other electronic means, unless a VA regulation, form, or directive expressly requires a different method of submission (for example, where a VA form directs claimants to submit certain documents by regular mail or hand delivery). This policy does not apply to the submission of a claim, Notice of Disagreement, Substantive Appeal, or any other submissions or filing requirements covered in parts 19 and 20 of this chapter.

In reviewing this paragraph in responding to comments, we determined that the last sentence might be misconstrued to mean that a claimant may not file a claim, a Notice of Disagreement (NOD), a Substantive Appeal, or other item covered in 38 CFR parts 19 or 20 electronically. This was not our intent. Section 5.130 concerns submission of a statement, evidence, or information, and not submission of claims. Filing requirements for an NOD and for a Substantive Appeal are in parts 19 and 20. To avoid this possible misconstruction, we propose to remove this sentence.

§ 5.131 Applications, Claims, and Exchange of Evidence with Social Security Administration – Death Benefits

One commenter noted a typographical error in the preamble language of the initially proposed rule. The error was in the misspelling of the word "belief". We acknowledge the typographical error but find no need to make the suggested change because the error is not substantive and is contained within the preamble language to the proposed rule which will not be published again.

§ 5.132 Claims, Statements, Evidence, or Information Filed Abroad; Authentication of

Documents from Foreign Countries

Initially proposed § 5.132(a) incorrectly grouped together claims, statements, information, and evidence, leading to the absurd implication that, under the terms of the regulation, a claim could be filed in support of a claim. Therefore, we propose to revise § 5.132(a) to separate a "claim" from a "statement, information, and evidence." Additionally, we reviewed § 3.108, the part 3 provision from which proposed § 5.132(a) is derived, and now propose to reinsert the introductory clause from that section. The introductory clause of § 3.108 explains that certain Department of State representatives in foreign countries are authorized to act as agents for VA. We believe that this information, which was not in initially proposed § 5.132(a), will be valuable to the reader in understanding the agency relationship between the Department of State and VA, and we propose to add it to paragraph (a).

Finally, the regulation text in initially proposed § 5.132 limits evidence of establishing birth, adoption, marriage, annulment, divorce, or death to copies of "public" or "church" records without referencing other religions or religious institutions. We propose to add "other religious-context" records to the regulation text in proposed § 5.132(c)(5) in order to recognize that other religions or religious records, besides church records, may suffice.

§ 5.134 VA Acceptance of Signature by Mark or Thumbprint

One commenter noted that the style of the title of this section as a question was inconsistent with other section titles throughout this part. The commenter suggested an

alternative title that “would more closely parallel that of the other proposed sections”, specifically “VA acceptance of signatures by mark or thumbprint”. We agree with the commenter’s suggestion and propose to adopt the proposed language as the section title with a slight modification.

The commenter also suggested revising the content of this section. The commenter questioned whether the regulation, as written, would produce unintended results, such as a situation where “an individual who can write his or her name may choose to make a mark or sign by thumbprint”. We recognize the possibility of the hypothetical posed by the commenter, however, it is unlikely that a person who is capable of signing would choose the more burdensome witness/certification process. Even if that occurred, the witness/certification process would be adequate to verify the person’s identity and therefore not cause a problem. We decline to make any change based on that comment.

§ 5.135 Statements Certified or Under Oath or Affirmation

One commenter noted that initially proposed § 5.135(b) only applied to evidentiary requirements for claims for service connection, even though we stated in the preamble that we proposed to apply the evidentiary requirements equally to all claims for compensation or pension benefits. We agree with the commenter and therefore propose to remove the restrictive language “for service connection” in § 5.135(b). Any documentary evidence or written assertion of fact filed by the claimant or on his or her behalf, for purpose of establishing a claim, must be certified or under oath or affirmation.

However, as the rest of the subsection provides, VA may consider a submission that is not certified or under oath or affirmation if VA considers certification, oath, or affirmation unnecessary to establish the reliability of a document. The language of the subsection has been revised for clarity.

In initially proposed § 5.135(b) we stated, "Documentary evidence includes records, examination reports, and transcripts material to the issue received by VA from State, county, or municipal governments, recognized private institutions, or contract hospitals." We have determined that the phrase "material to the issue" is inaccurate because this paragraph applies regardless of whether the evidence is material or not. We therefore propose to remove this phrase.

§ 5.136 Abandoned Claims

In the proposed rulemaking, we reserved § 5.136. 72 FR 28770, May 22, 2007. We have now decided to name it "Abandoned Claims", which is derived from § 3.158(a). We propose to make several changes to the language derived from § 3.158(a) to increase clarity. The scope of the current rule is limited to "an original claim, a claim for increase or to reopen or for purpose of determining continued entitlement". We propose to expand the scope of § 5.136 to include any claim. This is consistent with VA's interpretation and use of current § 3.158(a) and makes the rule more concise. The scope of current § 3.158(a) is also limited to "pension, compensation, dependency and indemnity compensation, or monetary allowance under the provisions of 38 U.S.C. chapter 18". For the same reasons we propose to expand the scope of § 5.136 to

include all benefits under part 5. We also propose to change the word “filing” to “receipt” in keeping with our practice of using consistent terminology in part 5.

§ 5.140 Determining Former Prisoner of War Status

One commenter noted a typographical error in proposed § 5.140(a)(3). We agree with the commenter that there should not be a hyphen between the terms “service” and “department”, and propose to change the language accordingly.

The commenter also pointed out a typographical error in the preamble language concerning this section. The error referred to a mischaracterization of the term “regional office decisions”. We acknowledge the typographical error, but propose not to make the suggested change because the preamble language to the initially proposed rule will not be published again.

In reviewing initially proposed § 5.140, we determined that it would be helpful to readers for all part 5 provisions regarding how VA determines former POW status to be in one section. Therefore, we propose to remove the definition of former POW from § 5.1, “General definitions”, and place it in § 5.140. In combining these two provisions, we have removed redundant material that was contained in initially proposed §§ 5.1 and 5.140.

§ 5.150 General Effective Dates of Awards or Increased Benefits

Several commenters questioned the use of the phrase “date entitlement arose” in

place of the phrase “facts found”. In the preamble to the proposed rule, we explained our decision to use “date entitlement arose” by the need for consistency throughout part 5 as well as our understanding that the two terms meant the same thing and are used interchangeably. One commenter did not agree that “facts found” and “date entitlement arose” were interchangeable terms. Rather, the commenter asserted that “facts found” is an alternative to “date entitlement arose” because the latter presumably arises as a matter of law, such as once a claim is actually filed, but is only compensable beginning from a date that is supported by the factual evidence. We believe that the phrase “date entitlement arose” will be clearer to lay persons than the phrase “facts found”, and that § 5.150(a)(2) makes clear that the phrase “date entitlement arose” refers to what the factual evidence shows rather than to procedural requirements such as filing claims. Also, VA regulations have long used “date entitlement arose” without the confusion the commenter described. We note that we do not intend any substantive changes to the determination of the effective dates for benefits based on this substitution of phrases.

The same commenter also felt that it would be unnecessary and possibly confusing to a Veterans Service Representative to pick the latter of either the “date of receipt of the claim” under paragraph (a)(1) or “date entitlement arose” under paragraph (a)(2). The commenter felt that the date of receipt of a claim would presumably always be the later date, since veterans usually experience a disability before filing a claim of entitlement to compensation. The commenter asserted that VA adjudicators sometimes assign “the later effective dates based on the reasoning that increased disability was not factually ascertainable until proven by a VA examination or medical opinion.”

We propose not to make any changes based on this comment because while (a)(2) acknowledges that the date entitlement arose usually precedes the filing of a claim, this may not always be the case. For example, a veteran may file a claim but have it properly denied due to lack of evidence. However, if the veteran later files new evidence that shows that the veteran did not meet all the criteria for a benefit on the date the claim was received, but his or her medical condition changed so that the criteria were satisfied while the appeal was still pending, the date entitlement arose will be after the claim was received. Regarding the assertion that VA adjudicators sometimes assign later effective dates because an increased disability was not factually ascertainable until proven by a VA examination or medical opinion, we note that VA has authority to accept non-VA medical records or lay statements as a basis for setting an effective date.

In responding to these comments, we noted that the first sentence of paragraph (a)(2) could be clarified. In the NPRM, it read, “For the purposes of this part, ‘date entitlement arose’ means the date shown by the evidence to be the date that the claimant first met the requirements for the benefit awarded.” We now propose to simplify this sentence to read, “For purposes of this part, ‘date entitlement arose’ means the date that the claimant first met the requirements for the benefit as shown by the evidence.”

Another commenter suggested keeping the phrase “facts found” because he did

not think the phrase was ambiguous or unclear. We have reconsidered the replacement of "facts found" with "date entitlement arose", however, we decline to keep the phrase "facts found". As discussed above, the phrase "date entitlement arose" is easier to interpret and apply as it is more instructive as to how VA will make an effective date determination. Furthermore, we do not intend this substitution of the phrases as a substantive change in determining effective dates for benefits.

One commenter suggested that VA should assume that entitlement to benefits arises as of the date of receipt of the claim rather than before the receipt of the claim. In the commenter's view, "this would prevent a conflict with 38 U.S.C. 5110(b)(2)". We disagree with the commenter and do not see a conflict between the regulation and statute. Indeed, if VA assumed that entitlement to benefits arises as of the date of receipt of the claim, rather than beforehand, that would deprive veterans of potential entitlement to earlier effective dates under § 5110(b)(2). We therefore propose to make no changes based on this comment.

Changes to § 5.150 Not in Response to Comments

We omitted the provisions of current § 3.400(h)(3) from the AM01 NPRM without any explanation in the preamble. For the reasons discussed below, we propose to omit them from part 5.

Section 3.400(h)(3) states, "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 effective date of an award based on such a reconsideration will be] the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans[‘] Appeals decision." The current structure of § 3.400(h) first appeared in the CFR in 1969. See 38 CFR 3.400(h) (34 FR 8703, June 3, 1969). VA maintained the previous distinction between non-final and final decisions, and also created distinct provisions governing final decisions based on the method used to reconsider or reopen the case. VA Regulations, Compensation and Pension, Transmittal Sheet 437 at I, 132-3R (May 21, 1969). . Paragraphs (h)(1) and (2) cover the most common difference of opinion situations and distinguish between non-final and final decisions. See id. Paragraph (h)(3) was added to apply to those admittedly "rare instances in which there has been final adjudication and no application for consideration or reopening has been submitted." Id.

For claims that the Board reconsiders and grants "on its own initiative", there is no distinct effective date rule. VA Central Office reconsiders only non-final decisions under its "difference of opinion" authority (see § 5.163), not final decisions. Indeed, it has no statutory or regulatory authority to reconsider final decisions. We are therefore not restating the (h)(3) Central Office provision in part 5.

The initially proposed rule mistakenly omitted the provisions of § 3.400(o)(1) (second sentence). This rule states that "[a] retroactive increase or additional benefit

will not be awarded after basic entitlement has been terminated, such as by severance of service connection." We propose to correct this omission by adding a paragraph (b) and redesignating proposed paragraph (b) as paragraph (c).

As stated in the AM01 NPRM, proposed § 5.150(b), now § 5.150(c), is a table of the location of other effective-date provisions in part 5, which are exceptions to the general effective date rule of proposed paragraph (a). As stated in the proposed rulemaking, the table is for informational purposes. We propose to add the sentence, "This table does not confer any substantive rights", to clarify that it is a reference tool, and not a substantive rule.

Also, as stated in the preamble to the initially proposed rule, the table showed both already published and as yet unpublished part 5 regulations, which were subject to change. In this NPRM, we have updated the table to reflect the updated part 5 citations. We have also moved the references to effective dates of reductions and discontinuances to a separate table in § 5.705(b). As a result, proposed § 5.150(b), now § 5.150(c), contains only effective date provisions for awards or increased benefits. Having separate tables for each type of effective date will enable readers to more easily locate the section they need.

§ 5.151 Date of Receipt

One commenter proposed adopting a mailbox rule instead of the current date-of-receipt rule for purposes of filing claims. The commenter pointed out that the Board of

Veterans' Appeals (the Board) accepts the postmark date as evidence of a document having been timely filed, and suggested that VA should adopt a similar rule for claims. See 38 CFR 20.305 (concerning how the Board will calculate the time limit for filing). We decline to adopt the commenter's suggestion because VA is prohibited by statute from awarding an effective date for a claim earlier than the date of receipt of the application or claim, unless specifically authorized. According to 38 U.S.C. 5110(a), "[u]nless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." Having a date-of-receipt rule provides for certainty and consistency in determining when a document relating to a claim is received.

Initially proposed paragraph (b) consisted of one 93-word sentence. We propose to break the paragraph into three sentences, which will make the paragraph easier to read and understand.

§ 5.152 Effective Dates Based on Change of Law or VA Issue

One commenter suggested that we reconsider our decision to restate § 3.114(a) without change. The commenter believed that § 3.114(a) was very difficult to understand and was neither claimant-focused nor user-friendly. In response to this comment, we propose to revise initially proposed § 5.152 to state the provisions in the active voice, replace unnecessarily technical language with more commonly understood

language, and reorganize the provisions into a more logical order.

The commenter set forth a detailed fact pattern and then correctly explained how the rule applied to those facts. The commenter then suggested that "any documented handling of a veteran's claims folder following a liberalizing change in law [should] constitute a claim for the newly available benefit" (emphasis in original). The commenter's concern was with VA's regulation authorizing retroactive payment of benefits for a period of 1 year prior to the date of receipt of a claim or the date of a VA-initiated review, if the claimant requests a review or VA initiates a review more than 1 year after the effective date of the law or VA issue. The commenter believed that such payments should be retroactive to the date of the first documented handling of the claims file following the effective date of the law or VA issue.

We decline to make any such change because it would be administratively burdensome and an extremely inefficient method of claims processing. The term "claim" is defined in § 5.1 as "a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit under this part." In other words, a claimant must identify the benefit sought. It would be unreasonable to require that, for example, the date of receipt of a change-of-address request, which would result in a handling of the claims file unrelated to a claim for compensation, serve as the effective date for retroactive benefits in a compensation claim.

The commenter also suggested that we define the phrase “administrative determination of entitlement”. The commenter did not explain how he believes the phrase is confusing, but the ordinary dictionary meaning of those words is clear. We note that a court has previously held that the meaning of this phrase is clear and consistent with its authorizing statute. McCay v. Brown, 106 F.3d 1577, 1580 (Fed. Cir. 1997). We therefore propose to make no changes based on this comment.

In initially proposed § 5.152(b) we used the term “payment”. We have determined that this term is too narrow because it excludes benefits that have no payment, for example a service-connected disability that was rated noncompensable. We have, therefore, used the term “benefits” instead, which is defined in § 5.1 as “any payment, service, commodity, function, or status, entitlement to which is determined under this part.”

In § 5.152(d)(2), we propose to replace the phrase “the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired” with “VA will pay a reduced rate or discontinue the benefit effective the first day of the month after the end of the notice period”. This change in terminology does not affect the payment made to a beneficiary based on a reduction or discontinuance. The purpose of this change is to remedy any confusion that Veterans Service Representatives or beneficiaries may have experienced in interpreting the former part 3 language, as well as to establish uniform language for describing how to calculate effective dates.

§ 5.153 Effective Date of Awards Based on Receipt of Evidence Prior to End of Appeal Period or Before a Final Board Decision

One commenter suggested that we define the term "appeal period". The term "appeal period" does not need a definition. The ordinary dictionary meanings for the words are sufficient to define the term. The commenter also recommended that the term "appeal period" be defined as any time "after a timely [Notice of Disagreement] and timely Substantive Appeal have been received". We decline to make such a change because the suggested definition is incorrect. A timely Notice of Disagreement (NOD) and Substantive Appeal are the triggers that initiate appellate review by the Board. The "appeal period", however, begins with the date of mailing of notice to a claimant concerning a decision made by the agency of original jurisdiction. See 38 CFR 20.302 through 20.306. The "appeal period" ends 1 year after the notice date if no NOD is received. Id. We agree, however, that proposed § 5.153 needs a cross-reference to 38 CFR parts 19 and 20 in order to instruct the reader on how to appeal to the Board. This proposed change will eliminate the need to define "appeal period" in part 5, as suggested by the commenter.

We believe that the heading of this section may have caused confusion. Therefore, we propose to revise the heading of § 5.153 to make clear that the regulation refers to both the appeal period and the time period after an appeal has been filed but before a final decision has been rendered.

The commenter also suggested that all evidence received between the date of

receipt of a claim and expiration of the appeal period must be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period, and, in claims for increase, evidence received during the 1-year period before the date of receipt of the claim must also be considered. Proposed 5.4(b) states that "VA will base its decisions on a review of the entire record." Therefore VA must consider the evidence described by the commenter.

One commenter believed that proposed § 5.153 would not prescribe the same effective date for an award based on evidence received during an appeal period as would have applied "had that evidence been submitted and been of record at the time of the decision under appeal". Proposed § 5.153 prescribed the effective date used in proposed § 5.150 (the general effective date provision for awards or increased benefits) for calculating an effective date based on information or evidence received during the appeal period. The intent in referencing this general effective date provision is to use the same effective date for awarding a benefit as if the final decision being appealed had not been decided. We disagree with the commenter that proposed § 5.153 would lead to a different result than its part 3 predecessors, §§ 3.156(b) and 3.400(q)(1). However, based on the comment, we have reviewed the last sentence of initially proposed § 5.153 and propose to clarify it by replacing it with the language in the last sentence of current § 3.400(q)(1), which states, "The effective date will be as though the former decision had not been rendered." This change would still lead to the same result as the proposed rule because § 5.150 is still the applicable general effective date provision. We therefore propose to replace the reference to § 5.150 in our regulation

text with a cross reference.

This same commenter had several concerns about the preamble discussion of proposed § 5.153 which the commenter believed would cause "misapplication of the law". The commenter expressed concern with our statement that "if the evidence is submitted within the appeal period or before an appellate decision is rendered, then the effective date of the award can be as early as the date VA received the 'open' claim." 72 FR 28778, May 22, 2007. The commenter noted that "an effective date can be earlier than the date VA first received the open claim." The commenter is correct to the extent that the commenter's statement is consistent with 38 U.S.C. 5110, and we did not intend any conclusion to the contrary.

Similarly, the commenter questioned VA's explanation regarding the removal of the qualifier "new and material" from proposed § 5.153, which is based on current § 3.156(b). 72 FR 28778, May 22, 2007. Specifically, the commenter disagreed with our statement that "if VA were to treat all evidence submitted after the appeal period has begun as 'new and material evidence,' then the effective date could not be earlier than the date VA received that evidence (which could be construed as a claim to reopen)." Id. We note that any ambiguity in this statement is addressed by our other statement in the preamble to the proposed rule that "[t]he current regulation [, § 3.156(b),] can be read to suggest that new and material evidence is needed while the claim is still 'open.' However, in such cases there is no claim to 'reopen' because the claim has not been 'closed' (that is, the claimant could still prevail on that claim)." 72 FR 28778, May 22,

2007. We therefore propose to make no change based on this comment.

Finally, we propose to not include current §§ 3.400(p) and 3.500(u) in part 5. These paragraphs are merely cross-references to effective-date provisions (currently in 38 CFR 3.114) are not necessary in part 5.

§ 5.160 Binding Effect of VA Decisions

One commenter questioned our decision not to repeat the 38 CFR 3.104(b) phrase "made in accordance with existing instructions" in proposed § 5.160(b). The commenter was concerned that our removal of the language would allow VA employees to disregard their procedural manuals and other VA guidance documents. As explained in our preamble discussion of the proposed rule, our reason for not including the language in our rewrite was because the "references to internal procedural manuals and other VA-generated documents that lack the force and effect of law are not appropriate for inclusion in the regulations". 72 FR 28770, May 22, 2007. The problem we addressed by removing the phrase "made in accordance with existing VA instructions" is that substantive rules in procedural manuals and other VA documents that were not promulgated in accordance with the Administrative Procedure Act (APA) are not enforceable against claimants or beneficiaries. Where VA issuances confer a right, privilege, or benefit, or impose a duty or obligation on VA beneficiaries or other members of the public, VA continues to be bound by notice and comment requirements under the APA. See Fugere v. Derwinski, 1 Vet. App. 103 (1990). Therefore, we propose not to make any changes based on this comment.

§ 5.161 Review of Benefit Claims Decisions

We received several comments regarding this proposed regulation. One commenter suggested that "whether a hearing is ordered or not, [§ 5.161] should be amended to require the Service Center Manager or Decision Review Officer who conducts post-decision review to be subject to the same duty-to-inform obligation as VA hearing officers are now required under 38 CFR [3.103(c)(2)]". The commenter mistakenly cited to 38 CFR 3.301(c)(2), but the duties of VA employees who conduct hearings are set forth in § 3.103(c)(2).

We agree with the commenter that VA should assist a claimant or beneficiary in developing his or her claim whenever possible and that the duty-to-inform is not limited to situations where a claimant requests a hearing. In practice, VA reviewers already suggest additional sources of evidence during informal conferences. Therefore, we propose to add a sentence to § 5.161(c) stating that, "In an informal conference, the reviewer will explain fully the issues and suggest the submission of evidence the claimant may have overlooked that would tend to prove the claim."

One commenter questioned the accuracy of the statement, "The review will be conducted by a Veterans Service Center Manager or Decision Review Officer, at VA's discretion." The commenter believed this statement was incorrect and referred to a VA application which the commenter believed provided "a right of election in these matters". We decline to make a change based on this comment. Proposed § 5.161 pertains to a

review before the agency of original jurisdiction, which is usually conducted by a Decision Review Officer (DRO). However, where a DRO is unavailable, VA reserves the right to have a Veterans Service Center Manager (VSCM) conduct the review. Proposed § 5.161 is based on § 3.2600, which contains this language as well.

One commenter questioned whether paragraphs (a) and (e) contain contradictory provisions. According to the commenter, "If the reviewer may only review a decision that has not yet become final, . . . how [can] this same reviewer . . . [also] reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final) . . . on the grounds of [clear and unmistakable error]" (internal quotations omitted). We disagree that paragraphs (a) and (e) are contradictory. While it is true that the scope of review under proposed § 5.161(a) is limited to the decision with which the claimant has expressed disagreement in the NOD, prior decisions are always subject to reversal or revision for clear and unmistakable error (CUE). As proposed § 5.162(d) explains, CUE is a very specific and rare kind of error reserved for situations where reasonable minds cannot differ about the nature of the error. Specifically, while a reviewer may not be looking for such CUE during the review, if the reviewer encounters one, paragraph (e), as well as § 5.162, allow for reversal or revision of the decision containing that error. We therefore propose to make no changes based on this comment.

In initially proposed § 5.161(b), we stated that VA will, "notify the claimant in

writing of his or her right to review under this section." Because we have defined "notice" in § 5.1 as "a written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any", we propose to revise paragraph (b) to state that VA will "send notice to the claimant . . .", to be consistent with our definition.

§ 5.162 Revision of Agency of Original Jurisdiction Decisions Based on Clear and Unmistakable Error

In reviewing comments received regarding initially proposed § 5.162, we determined that this section should be revised and reorganized to improve readability. We propose to add new paragraphs (a) "Scope"; (b) "Review for clear and unmistakable error (CUE)"; (c) "Binding decisions and final decisions"; and (d) "What constitutes CUE"; and redesignate initially proposed paragraph (b) as paragraph (e).

We also determined that § 5.162 mistakenly omitted the provision in 38 CFR 3.400(k), which states, "*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." We have added this provision to § 5.162(f), restated for better clarity: "In such cases, benefits are payable effective on the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision."

We received several comments based on this proposed regulation. One commenter suggested that we define the terms "reversed" and "revised". We decline to

adopt this suggestion because we prefer to rely on the common dictionary meanings of these terms and do not wish to deviate from these commonly understood meanings.

The same commenter noted that the cross reference to 38 CFR 20.1403 in proposed paragraph (a) is inadequate for purposes of adjudicating compensation and pension claims. The commenter suggested that VA should create a new subpart in part 5 that "will expressly set out for claimants and their representatives what it takes to file, raise, and prevail in a [claim] of clear and unmistakable error". We agree with the commenter that it will be helpful to include the relevant portions of § 20.1403 in part 5. Newly proposed paragraph (d) includes language from the first paragraph of § 20.1403 by explaining what CUE is. We decline, however, to make the proposed change in a new subpart because such a change is beyond the scope of this project. We are also removing the cross reference so readers will not infer that § 20.1403 applies to CUE claims at the AOJ.

One commenter urged that VA include in § 5.162, "[t]he filing and pleading requirements that are necessary in presenting successful CUE claims . . .", but offered no rationale for the suggestion. The same commenter urged that VA include provisions stating the "relationship of clear and unmistakable error claims to other statutes, regulations and legal doctrines", but offered no rationale for the suggestion.

VA has established procedures for filing claims (§§ 5.50 through 5.57). Claims for CUE require the same procedures. Proposed paragraph (d) clearly informs

claimants what they must show in order to prove CUE. Regarding the suggestion about the relationship of CUE to other statutes, regulations and legal doctrines, this type of analysis is not germane to the regulation because it would not inform the public about VA's duties or claimants' rights or duties. We therefore propose to make no changes based on these two comments.

In the NPRM preamble discussion of § 5.162, we stated that the intent of the section is to convey that VA adjudicative agency decisions that are final will be presumed correct unless there is a showing of CUE. We also stated:

> The requirement of a showing of CUE applies only to a "final decision," as defined by proposed § 5.2 to mean "a decision on a claim for VA benefits with respect to which VA provided the claimant with written notice" and the claimant either did not file a timely Notice of Disagreement or Substantive Appeal or the Board has issued a final decision on the claim. See 71 FR 16464, 16473-74 (March 31, 2006). We also proposed to incorporate 38 U.S.C. 5109A(c) and (d), which state that a CUE claim may be instituted by VA or upon request of the claimant and that a CUE claim may be made at any time after a final decision is made.

One commenter interpreted proposed § 5.162 as meaning that only final decisions can be reviewed for CUE. The commenter noted that the term "final" is not contained in the CUE statute, 38 U.S.C. 5109A, which states, "A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made."

The commenter asked why, if a claimant has filed a notice of disagreement and has not elected review under proposed § 5.161, VA should be unable to correct the decision if it is found to be clearly and unmistakably erroneous. The commenter further

asked why, if VA discovered a CUE after a "binding" decision but before it became final under § 3.160(d), the decision should not be subject to immediate correction.

The commenter asserted, “The law does not limit a claim of CUE to a final VA decision, but rather more accurately contemplates a ‘binding’ decision as defined in proposed § 5.160(a),” which is based on 38 CFR 3.104(a). The commenter further asserted that “[t]his would also be consistent with proposed § 5.161(e) [based on § 3.2600(e)], which permits decision review officers to review a binding, but non-final, decision that has been timely appealed and revise that decision on the basis of CUE.” The commenter urged VA to change initially proposed § 5.162 to state that CUE can be the basis to correct a “binding” decision even if the decision has not yet become “final”. We agree with the commenter and propose to revise proposed § 5.162 as discussed below.

The courts have consistently stated that a “final [AOJ] decision” is a prerequisite for a CUE collateral attack. Hines v. Principi, 18 Vet. App. 227, 236 (2004). Courts have repeatedly found that because an AOJ decision was final it was susceptible to reversal or revision based on CUE. See Knowles v. Shinseki, 571 F.3d 1167, 1168 (Fed. Cir. 2009) (where RO decision was presumptively final because veteran acknowledged notice and did not timely appeal, veteran properly raised claim of CUE); Hines, 18 Vet. App. at 235-36 (Court assumes RO decision became final where veteran filed NOD but not substantive appeal, and “[s]uch a final decision is a prerequisite for a CUE collateral attack”).

Concomitantly, courts have repeatedly found claims of CUE in AOJ decisions improper when that decision was not final, and that CUE may not be used to correct non-final decisions. In Norris v. West, 12 Vet. App. 413, 422 (1999), the court held, "as a matter of law that a [total disability rating based on individual unemployability] claim was reasonably raised to the RO and was not adjudicated. Thus, there is no final RO decision on this claim that can be subject to a CUE attack." See Best v. Brown, 10 Vet. App. 322, 325 (1997) (RO decision not final where RO failed to notify veteran, therefore veteran cannot raise CUE with respect to that rating decision).

The courts have not, however, ruled on whether, in order to be subject to correction based on CUE, a decision must be "final" as that term is used in § 3.160(d) (which is based on 38 U.S.C. 7105(c)). Section 3.160(d) states that a "finally adjudicated claim" is a decision on a claim, "the action having become final by the expiration of 1 year after the date of notice of an award or disallowance . . . ." We are unaware of any judicial precedent holding that, for purposes of CUE review, a decision becomes final only after the time to appeal has passed.

When VA amended 38 CFR 3.105(a) to add the term "final and binding", it intended the term to have the same meaning in that section as it has in § 3.104(a). Specifically, VA meant that decisions that are binding on all VA field offices at the time VA issues written notification in accordance with 38 U.S.C. 5104 are subject to revision for CUE. It did not mean "final" under 38 CFR 3.160(d) (that the decision was not timely

appealed or was affirmed by the Board.

A review of the regulatory history of § 3.105(a) shows that VA added the "determinations which are final and binding" language in a 1991 rulemaking. 56 FR 65845, Dec. 19, 1991. Prior to that rulemaking, 38 CFR 3.104(a) used the "final and binding" language, but § 3.105(a) used the language "determinations on which an action was predicated. . . ." In the preamble to the proposed rule, VA stated, "The proposed amendment is intended to clarify that decisions do not become final until there has been written notification of the decisions to the claimants. . . ." 55 FR 28234, July 10, 1990. Similarly, in the preamble to the final rule, VA stated that the purpose of the amendment was, "to establish by regulation the point at which a decision becomes final and binding on all VA field offices." It went on to state, "That point is reached when VA issues written notification on any issues for which it is required that VA provide notice to the claimant . . . ." 56 FR 65845, Dec. 19, 1991.

In Smith v. Brown, 35 F.3d 1516 (Fed. Cir. 1994), the issue before the court was whether an AOJ could reverse or revise a Board decision for CUE. In that context, the court analyzed the term "final and binding" as used in both in §§ 3.104(a) and 3.105(a) and found that the terms were intended to mean the same thing. Id. at 1523-25.

Congress codified 38 CFR 3.105(a) as 38 U.S.C. 5109A when it enacted Public Law 105-111, sec. 1(a)(1), 111 Stat. 2271 (1997). Disabled American Veterans v. Gober, 234 F.3d 682, 686 (Fed. Cir. 2000). As the court noted in Donovan v. West, 158

F.3d 1377, 1383 (Fed. Cir. 1998), “Although more detailed than [§ 3.105(a)], the basic substantive provision in [section 5109A] is the same as that in the regulation.” As the commenter noted, Congress did not include any finality requirement in that statutory language.

It has been long-standing VA practice to correct CUE in decisions that are “final and binding” under 38 CFR 3.105(a), even though they have not “become final by the expiration of 1 year after the date of notice [of a decision], or by denial on appellate review, whichever is the earlier.” 38 CFR 3.160(d). We codified this practice in 38 CFR 3.2600(e), which states the “reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).” The “decision being reviewed” under § 3.2600(e) is one that has not “become final due to failure to timely appeal”.

Finality under proposed § 5.1 is not a prerequisite for correction of a decision based on CUE, and we therefore propose to write new paragraph (b) to clearly state that final or non-final decisions may be corrected under the CUE doctrine. We propose to clarify this point in § 5.162(b) by stating that, “At any time after the AOJ makes a decision, the claimant may request, or VA may initiate, AOJ review of the decision to determine if there was CUE in the decision.”

Current § 3.105(a) states, "[W]here an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply." While this provision tells the reader what effective date provision applies in such cases, it is unclear that the standard governing the decision is clear and unmistakable error. The intended meaning of this sentence is seen in the regulatory history. When VA implemented the effective date rule for 38 U.S.C. 5112(b)(10), it explained that, "Payments will be terminated under this subparagraph on the basis of clear and unmistakable error. (See VA Regulation 1105(A).)" VA Regulations, Compensation and Pension, Transmittal Sheet 271 at iv (Dec. 1, 1962). Although the quoted language referred only to "terminated" benefits, it cited VA Regulation 1105(A), which at that time included both reductions and discontinuances of VA benefits. VA Regulations, Compensation and Pension, Transmittal Sheet 267 at 37-2R (Dec. 1, 1962). In order to clarify this point in part 5, we propose to state explicitly in § 5.162(e) that when VA reduces or discontinues a benefit resulting from a VA administrative error or error in judgment, it applies the clear and unmistakable error standard.

In the AM01 NPRM, we initially proposed to add a new definitions section that would define ''administrative error'' and ''error in judgment,'' in § 5.165(c)(2). We have determined that, because proposed § 5.165 (now renumbered as § 5.166) is an effective date regulation and this provision is substantive, it is more logical to place it in new § 5.162(e).

Initially proposed § 5.165(c)(2) included a list of examples of administrative errors

or errors in judgment. That list included, "(iii) Failure to follow or properly apply VA instructions, regulation, or statutes." We have determined that the term "instructions" is unnecessary. Historically, VA used the term "instruction" to describe the Administrator's binding guidelines for implementing newly enacted laws. VA has not issued such "instructions of the Administrator" since the 1960s. Because VA has not issued such instructions since the 1960s, it is not useful to include references to them in a list of examples of common sources of administrative error or error in judgment.

Finally, in paragraph (f), "Effect of reversal or revision on benefits", we propose to add a cross reference to § 5.167(c), the effective date rule for reduction or discontinuance of benefits based on VA administrative error or error in judgment. This will alert the reader that the effective date of such reductions or discontinuances differs from the general rule that the revision of a decision containing CUE is effective as if the original decision were correctly made.

§ 5.163 Revision of decisions based on difference of opinion

Initially proposed § 5.163 was one 89-word sentence. To improve readability we propose to divide it into three sentences. We also propose to specify that the revised decision must be more favorable to the claimant.

§ 5.164 Standard of Proof for Reducing or Discontinuing a Benefit Payment or for Severing Service Connection Based on a Beneficiary's Act of Commission or Omission

We have revised the proposed section heading of § 5.164 to apply to the several

types of adverse actions VA can take upon determining a beneficiary obtained a benefit by an act of commission or omission. We have revised the headings of §§ 5.167 and 5.177 similarly.

In initially proposed § 5.162(b), we stated, "[F]or reductions or discontinuances based on CUE resulting from an act of commission or omission by the beneficiary or with the beneficiary's knowledge, VA will apply § 5.165(b)." In doing so, we mistakenly overlooked that the first sentence of 38 CFR 3.105 states, "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 . . . ." Since § 3.105 includes the provisions on CUE, CUE is not the proper standard for a reduction or discontinuance of a benefit, or for severance of service connection, obtained through an act of commission or omission.

We have revised the proposed regulation to include severance of service connection among the adverse actions VA will take upon finding an act of commission or omission by a preponderance of the evidence, rather than by clear and unmistakable evidence. This would be consistent with the holding in Roberts v. Shinseki, 23 Vet. App. 416 (2010), where the court concluded "that the provisions of § 3.105 [(d)] do not apply to cases involving severance of service connection based on fraud." Id., at 428.

Neither the statutes nor the regulations provide a standard for reduction or discontinuance of a benefit obtained through an act of commission or omission. In such

cases, VA applies its default standard of proof, which is preponderance of the evidence. When VA implemented 38 U.S.C. 5112(b)(9) in VA Regulation 1500(b)(1) (currently 38 CFR 3.500(b)(1)), it explained that in determining whether benefits were based on an act of commission or omission "[t]he benefit of any doubt will be resolved in favor of the payee." VA Regulations, Compensation and Pension, Transmittal Sheet 271 at iii (Dec. 1, 1962). Thus, when the evidence is in equipoise, VA cannot reduce or discontinue benefits. But when the evidence against the beneficiary outweighs the evidence supporting the beneficiary, the benefit of the doubt doctrine does not apply (Gilbert v. Derwinski, 1 Vet. App. 49, 55-56 (1991)), and VA will reduce or discontinue.

Proposed § 5.3(b)(4) states that, "A fact or issue is established by a 'preponderance of evidence' when the weight of the evidence in support of that fact or issue is greater than the weight of the evidence against it." The preponderance standard is relatively easy for VA adjudicators to apply. It is also a high enough standard to protect beneficiaries from arbitrary or capricious reductions or discontinuances by VA. We also note that before reducing or discontinuing benefits under § 5.164, VA must provide due process to the beneficiary under § 5.83(a).

It will be helpful to inform the public that VA applies the preponderance standard in a reduction or discontinuance of a benefit obtained through an act of commission or omission. We therefore propose to add a new § 5.164, which states, "VA will reduce or discontinue a benefit , or sever service connection, if a preponderance of the evidence shows that it resulted in whole or in part, from an award based on an act of commission

or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge."

Although section 5112(b)(9) does not specify, VA has long interpreted it to mean that it applies when an award was based in whole or in part on the act of commission or omission. VA General Counsel's opinion VAOPGCPREC 2-90, 55 FR 27756 (July 7, 1990). We propose to include the phrase "in whole or in part" in paragraph (a) to make this point.

As stated in § 5.162(b), in a CUE claim, VA's review will be based "only on the evidence of record and the law in effect when the AOJ made the decision." However, no such restriction applies when VA reduces or discontinues a benefit, or severs service connection, for reasons other than CUE. To ensure that readers are aware of this, we propose to insert the following sentence into § 5.164(a), "The review will be based on the law in effect when the agency of original jurisdiction (AOJ) made the decision and on all evidence currently of record, regardless of whether it was of record at that time."

In proposed § 5.164(b), we provide readers with examples of an act of commission or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge. We selected all but the fourth of these examples because they are some of the most common situations in which VA reduces or discontinues benefits. We included the fourth example, service connection obtained by fraud, because severance of service connection greatly affects a veteran's benefits.

Paragraph (b) is not an exclusive list of acts of commission or omission.

§ 5.167 Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on omission or commission, or based on administrative error or error in judgment

In initially proposed § 5.165 (now renumbered § 5.167) we inadvertently omitted severance of service connection in the list of actions for which initially proposed § 5.165 provided effective dates. The regulation was incomplete without it, because VA will sever service connection if a claimant obtained it by an act of commission or omission, or if VA granted service connection because of its administrative error or error in judgment. We therefore propose to add this severance provision.

We propose to add a new § 5.164 and renumber initially proposed § 5.166 as § 5.165, and therefore we have renumbered initially proposed § 5.164 as § 5.166 and initially proposed § 5.165 as § 5.167. One commenter suggested that initially proposed § 5.165(c) effectively would permit VA to "take adverse action against claimants on much lower showings of VA error than the law governing CUE permits". We disagree with this comment. This paragraph merely implements the statutory provision in 38 U.S.C. 5112(b)(10). It does not address the standard applicable to VA decisions to reduce or discontinue benefits.

The commenter apparently believed that CUE and VA administrative error are similar in that both can result in a decision to reduce or discontinue an award, with VA

administrative error having to meet a lower standard than CUE. That is not correct. Proposed § 5.165 is an effective date provision which sets different dates for reduction or discontinuance of benefits depending on whether the beneficiary or VA made an error. When CUE or severance of service connection and is based on a beneficiary's act of commission or omission, VA corrects the award retroactively. When CUE results in a reduction or discontinuance of an award or severance of service connection and is based solely on VA error, VA corrects the award prospectively. VA is not lowering the standard for finding error that result in the reduction or discontinuance of benefits and these part 5 rules would not cause such an effect. We therefore propose to make no changes based on this comment.

Lastly, initially proposed § 5.165(c)(2) provided a list of administrative errors or errors in judgment. VA does not intend this list to be exclusive, so we propose to add the phrase "but are not limited to" to this provision, which is now included in § 5.162(e), in order to avoid that mistaken impression.

§ 5.170 Calculation of 5-year, 10-year, and 20-year Periods to Qualify for Protection.

In the preamble to initially proposed § 5.170, we failed to state that paragraph (a) is a new scope provision informing the reader of the rules gathered in § 5.170 (§§ 3.344, 3.951, and 3.957).

One commenter suggested that proposed § 5.170(a) was unclear because a

rating has to be “in effect” for 10 years before service connection is protected, but a rating has to be “continuous” for 5 years for a disability to be considered stabilized and “continuous” for 20 years for the disability level to be protected. The commenter suggested that we use either “in effect” or “continuous”, or explain why we use different terms.

For the following reasons, we decline to make a change based on this comment. We use different terms because different rights are being protected. As noted in the preamble to the initially proposed rule, a precedent opinion, VA General Counsel’s opinion VAOPGCPREC 5-95, 60 FR 19808 (Apr. 20, 1995), held that a disability could be considered “continuously rated” at or above a specified level for purposes of 38 U.S.C. 110 only if there was no interruption or discontinuance of the compensation being paid based on that rating for a period of 20 years or more. The statute provides this protection because veterans become dependent on a certain level of compensation when it has been paid without interruption for such a long period of time.

Similarly, when a disability has been continuously rated at the same level for 5 years or more, VA considers it to be stabilized. This provides some measure of protection in that the veteran is less likely to experience a reduction in compensation in the future or be subjected to repetitive examinations that yield the same result time after time. In both cases, when the term “continuous” is used, the protection provided concerns the level of compensation.

On the other hand, the term “in effect” is used only in connection with the 10-year protection afforded by 38 U.S.C. 1159 for service-connected status. There is no discussion of interrupted compensation payments breaking the continuity of a rating. Once service connection has been granted for a disability, that status is unaffected by variations in the level of compensation. If that status remains “in effect” for 10 years, service connection cannot be severed in the absence of fraud or military records showing the person did not have the requisite service or character of discharge. Since disability level and service-connected status are different concepts, it is appropriate to use different terms when discussing their protection criteria.

Initially proposed § 5.170(b) stated, “A protection period begins on the effective date of the rating decision and ends on the date that service connection would be severed or the rating would be reduced, after due process has been provided.” We believe the term “protection period” could be misinterpreted to mean that a rating is protected during this period. It is merely a qualifying period that triggers the protections in §§ 5.171, 5.172, and 5.175. We have revised this paragraph to clarify that point and reorganized the language to improve readability.

The same commenter suggested that the language in initially proposed § 5.170(c) was unclear because it did not explain whether the continuity of a rating resumes after a veteran is discharged from active military service. Currently, proposed § 5.170(c) provides that “a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active service.” As noted

above, in the preamble discussion for the proposed rule, we cited to VAOGCPREC 5-95, which held:

> Where compensation is discontinued following reentry into active service in accordance with the statutory prohibition on payment of compensation for a period in which an individual receives active-service pay, the continuity of the rating is interrupted for purposes of the rating-protection provisions of 38 U.S.C. 110 and the disability cannot be considered to have been continuously rated during the period in which compensation is discontinued.

Moreover, VA generally does not have the ability to examine veterans once they have returned to active duty, nor does it have a reason to do so, so VA generally cannot determine whether their condition has improved during that time. Such veterans can still satisfy the protection criteria of 38 U.S.C. 110, but the qualifying period for protection must begin anew upon resumption of compensation. We therefore propose not to adopt the change suggested by the commenter.

Another commenter questioned whether receipt of active duty for training (ACDUTRA) pay breaks the continuity of payment for purposes of protection. The former part 3 cross reference (§ 3.654) that followed § 5.170(c), which has since been updated with its part 5 counterpart § 5.746, clarifies that “active military service pay means pay received for active duty, active duty for training or inactive duty training”. Therefore, receipt of ACDUTRA pay is considered to be receipt of active military service pay, which operates to break continuity of payment for purposes of breaking continuity of a rating. We therefore propose not to make any changes to § 5.170 based on this comment.

§ 5.171 Protection of 5-Year Stabilized Ratings

One commenter observed that the NPRM misquoted sentence 5 of § 3.344(a) as follows: ". . . sentence 5, which states, 'lists those diseases that will not be reduced . . . '" (emphasis in comment) 72 FR 28782, May 22, 2007. The commenter is correct, the quoted language actually paraphrased sentence 5 of § 3.344(a). We rewrote sentence 5 of § 3.344(a) as proposed paragraph (d)(2), reorganized for clarity. The comment, though accurate, does not require any change from the proposed regulation.

This commenter asserted that § 3.344 is a very difficult regulation full of outdated, superfluous verbiage, much of which we could discard. The commenter however, gave one example, specifically the eighth sentence of § 3.344(a) (initially proposed as § 5.171(d)(6)), which the commenter asserted was meaningless. That sentence stated, "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."

We disagree that this provision is meaningless, but we conclude it is not useful because it does not provide any instruction, impose any duty, or convey any right. The sentence essentially informs VA employees who perform disability ratings that syphilis and alcoholic deterioration diagnosed after a long prior history of "psychosis, psychoneurosis, epilepsy, or the like," can mask the persistent prior disease, and therefore the focus of the rating decision should be the "preceding innocently acquired

manifestations." Initially proposed paragraph (d)(6) does not actually instruct VA to take any specific action. It does not impose any specific duty different than does paragraph (d)(2) for diseases subject to episodic improvement, and it does not convey any rights in addition to those stated in paragraph (d)(2). Consequently, we agree that it is confusing surplus and propose not to repeat the eighth sentence of § 3.344(a) in part 5.

One commenter asked us to clarify that improvement in a veteran's disability condition must be demonstrated before VA can reduce a stabilized disability rating. The commenter suggested that before VA can reduce a disability rating, not only must it be determined that an improvement to a disability has actually occurred, but also that the improvement reflects an improvement in the veteran's ability to function under ordinary conditions of life.

In response to this comment, we note that initially proposed § 5.171(c) stated, in pertinent part, that VA will not reduce a stabilized rating unless there is evidence of material improvement and VA may reduce a stabilized rating when an examination shows sustainable material improvement, physical or mental, in the disability, and the evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.

As a practical matter, it is doubtful that there would be a case in which the evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life unless there had already been material

improvement under the ordinary conditions of life. Therefore, we propose to add "under the ordinary conditions of life" to proposed paragraph (c)(1), to read, "An examination shows material improvement in the disability, under the ordinary conditions of life . . . ."

In addition, we propose to remove the word "sustainable" because it refers to the veteran's future condition, which is covered by paragraph (c)(2). We propose to change the word "when" to "if" in the second sentence of paragraph (c) because "when" incorrectly implies that the veteran's condition will eventually improve. Lastly, we propose to remove the phrase, "physical or mental". It is unnecessary because all disabilities are either physical or mental.

One commenter suggested that paragraph (d) is vague and ambiguous because it does not explain when medical examinations for purposes of determining material improvement would be administered. The commenter also thought that the paragraph failed to explain whether "VA will follow any standards or rules when it chooses certain veterans for a new examination, or if VA will use subjective criteria in its selection".

Initially proposed § 5.171 does not include the standards VA applies when determining whether and when to reexamine a veteran because these standards are described in detail in proposed § 5.102, "Reexamination requirements". Based on this comment, we propose to add a cross reference to § 5.102 at the end of § 5.171.

One commenter questioned whether proposed paragraph (d) would create

tension with the standard governing reduction of total disability ratings under § 3.343. Section 3.343 pertains to the rule governing continuance of total disability ratings and outlines a list of mandatory considerations that VA must take into account before reducing such total disability ratings. The commenter expressed concern over whether adoption of § 5.171(d) would in effect "allow adjudicators to bypass the established protections of § 3.343 in favor of reducing a total evaluation by . . . more lenient conditions". Proposed § 5.171(d) would not have such an effect. It is a rewrite of § 3.344(a), which simply provides guidance on factors that VA will consider before reducing disability ratings that have either become stable or otherwise were made on account of diseases that are subject to temporary or episodic improvement. The part 5 counterpart to § 3.343 is § 5.286, which will govern the continuance of total disability ratings. We therefore propose to make no changes based on this comment.

One commenter suggested that the organization of paragraph (d)(1) could be improved by separating the topic of "how VA will determine whether there has been material improvement" from "what types of evidence a complete medical record consists of". The commenter recommended reorganizing the last sentence of paragraph (d)(1) and its paragraphs into a new paragraph (d)(5) after our discussion concerning what constitutes material improvement. We agree with this suggestion and propose to add a new paragraph (d)(5) consisting of the last sentence of paragraph (d)(1) and its paragraphs. We propose to redesignate initially proposed paragraph (d)(5) as (d)(6).

One commenter suggested that we replace the term "medical record" with

"evidentiary record" in regard to initially proposed paragraph (d)(4), which pertains to when VA will determine material improvement exists for purposes of decreasing disability ratings. The commenter was concerned that the term "medical record" may unduly restrict VA's current practice of considering all evidence in the record, including lay evidence. We agree with the commenter and propose to adopt the suggested change.

In reviewing initially proposed § 5.171(e) based on this comment, we noted that in the preamble of the proposed rulemaking, 72 FR 28770, May 22, 2007, we failed to explain that we had omitted from paragraph (e) the following, contained in current § 3.344(b): "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." We omitted this language because VA schedules reexaminations for various future dates (based on the factors described in § 5.102) and these dates are not limited to 18, 24, or 30 months in the future.

We also determined that the scope of paragraph (e) (which is based on current § 3.344(b)) needed clarification. We therefore propose to revise paragraph (e) to clarify that it only applies to cases involving a change in diagnosis.

§ 5.173 Protection Against Reduction of Disability Rating when VA Revises the Schedule for Rating Disabilities

Initially proposed § 5.173(b) described how VA modifies a rating that was

assigned under the 1925 Schedule for Rating Disabilities. There are no longer any veterans being compensated under the 1925 Schedule. We therefore propose to remove the last phrase in paragraph (a) and all of paragraph (b) because these concerned revisions to ratings under the 1925 Schedule.

§ 5.175 Severance of Service Connection

Initially proposed § 5.175(a)(1) and (2) provided that the protection from severance of 10 year old service connection applies to grants of disability compensation and to dependency and indemnity compensation (DIC), respectively. As initially proposed, § 5.175 did not address whether this protection applies to benefits under 38 U.S.C. 1151.

In August 2010, the U.S. Court of Appeals for Veterans Claims in Hornick v. Shinseki, 24 Vet. App. 50, 56 (2010), held that the preclusion in 38 U.S.C. 1159 against severing service connection in effect for 10 years or more pertains to disability compensation payments awarded under 38 U.S.C. 1151 (Benefits for persons disabled by treatment or vocational rehabilitation). We propose to add the following at the end of initially proposed paragraph (a)(2): "and to disability compensation or DIC granted under 38 U.S.C. 1151" to afford this protection to these benefits. Adding "disability compensation . . . under 38 U.S.C. 1151" implements the holding in Hornick. We are also adding "or DIC granted under 38 U.S.C. 1151", to be consistent with sections 1151 and 1159, which both apply to DIC. This addition is also consistent with Hornick.

One commenter suggested that we separate this section into two regulations, one to address the protection of service connection and the other to address the severance of service connection. We decline to make this change because the paragraphs are appropriately titled regarding when protection of service connection applies versus when severance of service connection applies. Further, when taken as a whole, the entire section addresses the single issue of whether and when VA may sever service connection.

The commenter further asserted that VA should not adopt the proposed regulation § 5.175(b)(2) because "the law of clear and unmistakable error bars a veteran from submitting, and the VA from considering, any new medical opinion evidence (or any new evidence for that matter), in order to establish the existence of CUE". The commenter also stated that because the law that governs CUE "does not permit the veteran to successfully argue that a change in diagnosis can be accepted as a basis for the award of service connection 'based on clear and unmistakable error . . .', VA cannot be permitted to sever an award of service connection based on the same sort of medical evidence." The commenter asserted that this proposed provision "reflects inconsistent and arbitrary agency action". The commenter asserted that the courts have clearly held that "when an allegation is made that a VA decision contains CUE, that VA's decision on the allegation is strictly limited to the evidence that was before the VA adjudicator at the time VA made the decision being challenged as containing CUE." The commenter cited Russell v. Principi, 3 Vet. App. 310 (1992), for the proposition that new medical evidence that corrects an earlier diagnosis that was a

basis for an earlier decision by the agency of original jurisdiction cannot be considered in a CUE case.

The commenter also noted that the Board of Veterans' Appeals (Board) regulation contained in 38 CFR 20.1403(d) states, "(d) Examples of situations that are not clear and unmistakable error — (1) Changed diagnosis. A new medical diagnosis that 'corrects' an earlier diagnosis considered in a Board decision."

For the following reasons, we propose to make no change based on this comment. The commenter fails to recognize the distinction between § 3.105(a) and § 3.105(d). As used in § 3.105(d) and proposed § 5.175(b), the phrase "clearly and unmistakably erroneous" is intended to describe the high standard of proof that must be met before VA can sever service connection. The phrase "clearly and unmistakably erroneous" is not intended to incorporate the procedural rule applicable to claims under § 3.105(a) that collateral review of a prior final decision must be based solely on the evidence that was before VA at the time of that decision. The provisions of § 3.105(a) and § 3.105(d) involve different procedural standards because § 3.105(a) concerns collateral review and retroactive correction of a final decision. In contrast, § 3.105(d) involves only review of the veteran's entitlement to benefits prospectively. VA recognizes that the use of the same high standard, clear and unmistakable error, might be confusing to some laypersons. For that reason, VA has consistently made clear in its regulations that severance determinations under § 3.105(d) may be based on consideration of evidence obtained subsequent to a prior determination.

Furthermore, we note that the provision in proposed § 5.175(b)(2) is not new; it is based on a substantially similar provision in current 38 CFR 3.105(d). The courts have held that, as a general principle, when an allegation is made that a VA decision contains CUE, VA's decision on the allegation is strictly limited to the evidence that was before the VA at the time VA made the decision being challenged as containing CUE. The U.S. Court of Appeals for Veterans Claims set forth this principle in the Russell case (id. at 314).

However, Russell involved a CUE claim under 38 CFR 3.105(a), not severance of service connection under § 3.105(d). Section 3.105(d) states, in pertinent part that "[s]ubject 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) . . . . 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 . . . ."

Thus, § 3.105(d) does not state that decisions will be reversed because they were based on CUE. These are dealt with in § 3.105(a). Rather, § 3.105(d) states that a veteran's service-connected status will be severed if it is clearly and unmistakably

erroneous. Since it is a review of the veteran's current status, VA naturally must consider current evidence.

The courts have consistently upheld the long-standing provision in 38 CFR 3.105(d) that evidence concerning a change in diagnosis (which was not of record when service connection was granted) may be considered in determining whether service connection is clearly and unmistakably erroneous. See Stallworth v. Nicholson, 20 Vet. App. 482, 488 (2006); Daniels v. Gober, 10 Vet. App. 474, 480 (1997); Venturella v. Gober, 10 Vet. App. 340, 343 (1997). As the court has noted, if VA were not permitted to consider post-decisional evidence in a severance case, VA "would be placed in the impossible situation of being forever bound to a prior determination regardless of changes in the law or later developments in the factual record." Venturella, 10 Vet. App. at 343.

The commenter's reliance on 38 CFR 20.1403(d) is inapposite to the question of the validity of § 3.105(d). Section 20.1403 implements 38 U.S.C. 7111 which relates to the review of Board decisions based on clear and unmistakable error. In the proposed rulemaking for § 20.1403, 63 FR 27535, May 19, 1998, VA noted that, "the term 'clear and unmistakable error' originated in veterans regulations some 70 years ago, see generally Smith (William) v. Brown, 35 F.3d 1516, 1524-25 (Fed. Cir. 1994), and is now incorporated in VA regulations governing VA RO determinations. 38 CFR 3.105(a)." VA also noted (at 63 FR 27536, May 19, 1998) that the legislative history for section 7111 "indicates that the Congress expected the Department would implement

section 1(b) of the bill in accordance with current definitions of CUE. H.R. Rep. No. 52, 105th Cong., 1st Sess. 3 (1997) (report of House Committee on Veterans' Affairs on H.R. 1090) (”Given the Court's clear guidance on this issue [of CUE], it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome"); 143 Cong. Rec. 1567, 1568 (daily ed. Apr. 16, 1997) (remarks of Rep. Evans, sponsor of H.R. 1090, in connection with House passage) (”The bill does not alter the standard for evaluation of claims of clear and unmistakable error.")”

Thus, § 20.1403 was intended to codify a statute whose basis was § 3.105(a), not § 3.105(d). As such, there is no reason why § 3.105(d) or § 5.175 must contain the same procedures as those in § 20.1403.

For the reasons stated above, we propose to make no changes based on this comment.

We propose, however, to revise the heading of initially proposed paragraph (b) to read, “Standard of proof to sever service connection—general rule”, and to add paragraph (c), “Standard of proof to sever service connection—fraud”. The new paragraph (c) comprises a cross reference to proposed § 5.164. It serves, without repeating proposed § 5.164, to inform the reader that VA’s burden of proof to sever service connection obtained by fraud is the same as to sever service connection obtained by any other act of commission or omission. Fraud is distinguishable from

other acts of commission or omission in that a claimant's fraud will breach the protection established after service connection has been in effect for 10 years, whereas other acts of commission or omission will not.

These changes would correct a misstatement in the proposed rule that the dissenting opinion in Roberts v. Shinseki, 23 Vet. App. 416, 435-39 (2010) (Hagel, J., dissenting) called to our attention. In that case, the dissent first noted that, in rewriting §§ 3.957 (protection of service connection in place 10 years or longer) and 3.105(d), "VA intends to 'clarify' and recodify 38 CFR 3.957 and the provisions of 38 CFR 3.105(d) that govern when service connection may be severed at 38 CFR 5.175, entitled 'Protection or severance of service connection.'" Id. at 436. The dissent also noted that our proposed regulations did not except severance of service connection based on fraud from the due process or burden of proof elements of §§ 3.957 or 3.105(d). Id. at 436, 440. Finally, the dissent noted that the NPRM stated that it explained any substantive changes between part 3 and part 5, 72 FR 28771-72, May 22, 2007, and that there was nothing in the NPRM "indicating that the rewriting and restructuring of the regulations [pertaining to severance of service connection for fraud] are intended as substantive changes." Id. at 437-39. From these observations, the dissent reasoned, the NPRM revealed VA's interpretation of §§ 3.957 and 3.105(d) as requiring application of both the process and burden of proof provisions of § 3.105(d) before severing service connection.

Any disparity between the NPRM and the Secretary's position in the Roberts

litigation results from our misstatements in the NPRM. In discussing initially proposed § 5.175 in the NPRM, we described that paragraph (a) would provide that service connection in effect for 10 years or more "may not be severed unless . . . (1) The original grant was obtained through fraud." We further explained that proposed paragraph (b) "provided that severance of service connection may also occur when evidence establishes that it is clearly and unmistakably erroneous . . . ." 72 FR 28783, May 22, 2007. By stating "also", we intended to state that § 5.175(a) and (b) would be alternatives for severing service connection. We did not mean that they would be a sequence of events: first, piercing the 10-year protection by showing fraud, and second, finding clear and unmistakable error in the grant of service connection obtained by fraud. We propose to correct the error in initially proposed § 5.175 by explicitly distinguishing the procedures and the burden of proof that apply to sever service connection that a claimant obtained by fraud.

§ 5.176 Due Process Procedures for Reducing or Discontinuing Disability Compensation Payments or for Severing Service Connection

One commenter suggested that we revise the introductory paragraph to enlarge the scope of § 5.176 to include situations where VA reduces or discontinues a disability rating but compensation benefits are not affected. Currently, proposed § 5.176 and its part 3 predecessor, § 3.105(e), require that VA provide notice of a contemplated adverse action followed by a 60-day period for the presentation of additional evidence only in situations where a lower rating would result in a reduction or discontinuance of compensation payments currently being made. However, where compensation benefits

are not affected, where there is no adverse action, VA will provide only contemporaneous notice. See § 5.83(a).

We decline to make the suggested change to enlarge the scope of initially proposed § 5.176 because in cases where VA decreases the rating of any disability or disabilities but does not reduce the veteran's overall disability rating, there is no reduction of monetary benefits. In such cases, VA has no statutory duty to send advanced notice of its decision. Stelzel v. Mansfield, 508 F.3d 1345 (Fed. Cir. 2007). Further, due process concerns are not implicated because the veteran suffers no loss of benefits. Moreover, we note that along with the contemporaneous notice, VA also provides the veteran with information on procedural and appellate rights regarding the decision.

Another commenter believed that the initially proposed rule would eliminate the due process procedure of having an impartial VA employee participate in the review process for reducing ratings. The commenter noted that such procedures are already followed in the context of predetermination hearings, see § 3.105(i), and since the reduction of ratings also have an adversarial character, the practice “should be carried over to the new regulations”. While we agree that proceedings involving proposed adverse actions should be conducted by VA personnel who were not directly involved in proposing the adverse action, we decline to make changes based on this comment. The reason is that this due process procedure is already recognized in proposed § 5.82(d) which states that if the hearing arises in the context of a proposed reduction,

discontinuance, other adverse action or an appeal, a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing.

Proposed § 5.82(d) applies to a claimant's or beneficiary's right to a hearing upon being notified of a proposed reduction, discontinuance, or other adverse action under proposed § 5.83. Therefore, it is unnecessary to repeat the language of proposed § 5.82(d) in proposed § 5.176 because § 5.82(d) outlines an overarching VA policy that applies in all situations where a hearing is based on a proposed reduction, discontinuance, other adverse action, or on an appeal.

In addition, the commenter also urged that VA include in proposed § 5.176 the overarching duty to assist claimants in their claims by "suggest[ing] the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position". The commenter urged that proposed § 5.176 be amended to require that VA inform beneficiaries of what type of evidence they should file to show "that service connection or a rating should be maintained." The commenter provided an example, urging that VA inform a beneficiary if a notice of disagreement as to the reduction satisfies the requirement and would toll the 60-day period so that the veteran has more time to file additional evidence if needed.

As a preliminary matter, we note that it would be impossible for a beneficiary to file a valid notice of disagreement until VA had issued a decision, not merely a notice of

a proposed decision. Initially proposed § 5.176(c) stated that in proposing a reduction or discontinuance, VA will notify the beneficiary that they may file, "evidence to show that service connection should be maintained, the rating should not be reduced, or the benefits should remain intact." If such notices were to attempt to specify the exact type of evidence that is relevant, they might inadvertently omit relevant evidence that the beneficiary might file. Rather, it is more helpful to clearly explain "the contemplated action and furnish detailed reasons for the proposed reduction or discontinuance" (as stated in initially proposed § 5.176(b)) and allow the beneficiary to determine what evidence they can obtain or identify for VA to obtain.

The commenter also suggested that the 60-day time period for a beneficiary to present evidence when disputing a proposed severance of service connection or reduction in ratings is too short. The commenter claimed that "if VA expects veterans to file medical or scientific evidence to support their claims, the 60-day period will be too short and veterans will be effectively deprived of their procedural due process". We decline to change the time period within which beneficiaries must present evidence to challenge a proposed adverse action. Beneficiaries generally are able to meet the 60-day deadline. Furthermore, VA already has procedures and regulations in place to extend the 60-day period if good cause is shown. See § 5.99, "Extensions of certain time limits", based on § 3.109(b).

Finally, the commenter remarked that "many veterans subject to reduction or elimination of benefits have previously been found to be profoundly disabled." The

commenter expressed concern that "VA should recognize that in reduction actions it is dealing with some of the more helpless segments of the entire veteran population and should tailor its procedures accordingly." VA beneficiaries subject to reduction of benefits have varying degrees of disability and our procedures are intended to provide fair treatment to all disabled veterans. To the extent that a beneficiary subject to a proposed reduction may have difficulty responding due to a profound disability, the veteran may request a good cause extension under § 5.99. We therefore propose to make no changes based on this comment.

In reviewing initially proposed § 5.176 to respond to comments, we noted that it is largely redundant of initially proposed § 5.83(a), Right to notice of decisions and proposed adverse actions. We therefore propose to delete § 5.176 and leave that number as reserved. We propose to include the following sentence from initially proposed § 5.176 in § 5.83: "If VA receives no additional evidence within the 60 days, or the evidence received does not demonstrate that the action should not be taken, VA will provide notice to the beneficiary that VA is taking the action." We propose to omit the phrase "Prepare a rating proposing the adverse action and" because this is a administrative action that provides no due process to the beneficiary which is not already provided by the notice of the proposed adverse action.

§ 5.177 Effective Dates for Reducing or Discontinuing a Benefit Payment or for Severing Service Connection

We redesignated initially proposed § 5.177(c) as § 5.177(i) to move the

paragraph explaining the exceptions of the regulation to the end of the section. We accordingly redesignated initially proposed § 5.177(d) through (i) as § 5.177(c) through (h), respectively.

In relation to the comment on initially proposed § 5.176 regarding enlarging the scope of situations where VA will provide advance notice of adverse actions, the commenter also suggested revising initially proposed § 5.177(f) for the same reasons. We decline to make this change because, as explained in our discussion on proposed § 5.176, where a decision does not result in adverse action, VA will follow the notification procedure in proposed § 5.83(b). Because the decision will not adversely affect compensation payments or other benefits, the notification procedure outlined in § 5.83(b) is adequate to preserve the veteran's procedural and appellate rights if the veteran disagrees with the decision.

One commenter questioned whether initially proposed § 5.177(f) would effectively reduce a veteran's compensation benefits by default "whether or not a final decision authorizing that reduction has been issued". The commenter mistakenly believed that VA would reduce benefits before issuing a final decision on the matter. We decline to make any change based on this comment because § 5.177 clearly provides for two 60-day periods before a reduction or discontinuance takes effect: the first following a notice of a proposed adverse action (see § 5.83(a), the second following the notice of the final decision.

In initially proposed paragraphs (d), (e), and (f), we stated that VA will sever service connection or reduce or discontinue benefits "effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision." We propose to revise the language in each of those paragraphs to clarify that after applying the 60-day notice period, VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will then take the appropriate action to modify benefits, effective the first day of the month after the second 60-day period.

As with initially proposed § 5.175, discussed above, the dissent in Roberts, 23 Vet. App. at 435-39, revealed that initially proposed § 5.177 did not clearly accomplish our intent, or, at least, it was ambiguous when read together with the regulation on effective dates for correcting erroneous awards (initially proposed § 5.165, redesignated § 5.167). We therefore propose to revise the first sentence of initially proposed paragraph (d), redesignated as paragraph (c), to read: "Unless severance is based on the beneficiary's act of commission or omission that resulted in VA's grant of benefits, this paragraph applies when VA severs service connection." We also propose to add a cross reference to § 5.167 stating, "See § 5.167 for effective date of severance of service connection obtained by fraud."

The Roberts dissent noted that "VA reports that proposed § 5.165 'applies only to reductions or discontinuances of erroneous awards.' 72 Fed. Reg. 22,779." Id. at 438, fn 13. The next sentence in the NPRM stated, however, "If a payment has not been

authorized by a rating decision, then VA has not made an award of such an erroneous payment and therefore recovery of that payment is not a reduction or discontinuance of an 'erroneous award' under 38 U.S.C. 5112(b)(9) or (10)." In other words, initially proposed § 5.165 distinguished "reductions or discontinuances" of "erroneous awards" from "reductions or discontinuances" of other types of payments that are not "awards," and did not distinguish "reductions or discontinuances" from severance for fraud as an act of commission or omission. The proposed revision to redesignated § 5.177(c) and the additional cross reference to § 5.167 should make perfectly clear that the effective date of severance of service connection obtained by fraud is governed by proposed § 5.167 and is not 60 days after VA provides notice of the final decision severing service connection.

As initially proposed, § 5.177(g) stated that VA would reduce or discontinue pension payments because of a change in disability or employability status effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision. This statement conflicts with 38 U.S.C. 5112(b)(5), and current 38 CFR 3.105(f). The beneficiary is not afforded a second 60-day period before his or her benefits are to be reduced. We, therefore, propose to correct paragraph (g) in redesignated paragraph (f) to state that the effective date for the reduction or discontinuance of pension because of a change in disability or employability status is the first day of the month after notice to the beneficiary of the final decision.

We propose to move the effective date provision in initially proposed paragraph

(h) from § 5.177 to § 5.591(b)(5), to consolidate all the effective date rules on Chapter 18 monetary allowance into one section.

IX. Subpart D: Dependents and Survivors AL94

In a document published in the Federal Register on September 20, 2006, we proposed to revise VA's regulations governing dependents and survivors of veterans, to be published in a new 38 CFR part 5. 71 FR 55052. We provided a 60-day comment period that ended November 20, 2006. We received submissions from three commenters: Disabled American Veterans, and two members of the general public.

§ 5.181 Evidence Needed to Establish a Dependent

In the NPRM, we proposed §§ 5.181 and 5.182 as separate sections. Because we have combined the contents of initially proposed §§ 5.181 and 5.182, as explained in § 5.182 below, we propose to renumber initially proposed § 5.180 as § 5.181. We propose to mark § 5.180 as reserved.

We also propose to reorganize and simplify the contents of initially proposed § 5.180 into § 5.181.

Proposed paragraph (a) simplifies the initially proposed "purpose" paragraph to clearly state that this regulation is limited to rules governing adding dependents, and with the exception of paragraph (d), does not govern changes to existing dependents. Also, in proposed paragraph (b)(1), we have eliminated the applicability of this rule to a

case involving death, because death does not establish a dependent. Similar conforming changes were made to § 5.182, which governs only changes to the status of existing dependents. We proposed these changes for clarification purposes; we do not intend to change the persons to whom these rules would have applied as initially proposed.

We also propose to change paragraph (b)(1) by inserting ", day," after "month" and "(city and state, or country if outside of a state)" after "place". This information is necessary for VA to properly document marriages, termination of marriages, and births.

In initially proposed paragraph (c), we stated "VA will require additional supporting evidence to establish a veteran's marital status or a parent/natural child relationship . . . if any of the following factors are true: . . . (3) VA questions the validity of all or part of the statement;". In comparing paragraph (c) with other sections in subpart D, we determined that the term "validity" means having legal effect or force. Our intent in paragraph (c)(3) was simply to include a question of the accuracy of a statement as one of the reasons for requiring additional evidence. We have, therefore, replaced the term "validity" with "accuracy".

In paragraph (c)(5), we propose to change the rule that a statement is not sufficient to establish dependency when there is an indication of fraud or misrepresentation. Thus, we intend to change "in the other evidence in the record" to "in other evidence in the record", removing the word "the" that appeared before "other

evidence". This change eliminates any suggestion that the reasonable indication of fraud or misrepresentation must appear in the totality of the evidence. VA will require additional evidence if any individual piece of evidence indicates fraud or misrepresentation, or if the evidence in its entirety gives such indication. This revision would make proposed paragraph (c)(5) better conform to proposed paragraph (c)(4), which would provide that a statement is not sufficient to establish dependency if the "statement conflicts with other evidence in the record . . ."

For reasons explained in the preamble to initially proposed § 5.181(c), 71 FR 55052, 55055, we are omitting certain provisions of § 3.213(b) from part 5, subpart D. Because we now propose to consolidate initially proposed § 5.181(c) and other initially proposed provisions in currently proposed § 5.184(d), we would repeat only the first sentence of § 3.213(b) in § 5.184(d). The restoration of benefit provisions of § 3.103(b)(4), restated in § 5.84, is more comprehensive than the restoration provision of § 3.213(b). Consequently, all but the first sentence of § 3.213(b) is superfluous, and § 5.184(d) would restate only that first sentence.

Initially proposed § 5.180(d) stated:

> The types of additional supporting evidence required by paragraph (c) of this section are set forth in §§ 5.192 through 5.194, 5.221, 5.229 and 3.211 of this chapter. Where evidence is set forth in a particular section in the order of preference, VA may accept evidence from a lower class of preference if it is sufficient to prove the fact at issue.

This language was confusing. The rule was intended to explain that certain types of evidence are needed to establish specific facts. For example, in proposed

§ 5.192(c), a copy of a public record of marriage is generally more reliable and consequently preferred over an affidavit from the official who performed the marriage ceremony, and therefore, VA will not accept the latter unless the former is unobtainable. These rules of preference are more thoroughly explained in the individual paragraphs that set forth the hierarchy of preferred evidence, so we struck the language from initially proposed § 5.180(d). The only text that remained were the cross-references to the actual rules that describe the additional evidence that may be provided to establish specific facts. Therefore, we propose to move those cross-references into § 5.181(c) and renumber initially proposed § 5.180(e) as § 5.181(d). We further propose to add language to the specific regulations cited in proposed § 5.181(c), which include §§ 5.192(c), 5.221, 5.229, and 5.500. In addition, we have determined that the list of cross references was incorrect. We propose to correct the list in § 5.181(c).

Several initially proposed rules in RIN 2900-AL94 inadvertently added a requirement that a claimant's or beneficiary's statement filed as proof of marriage, termination of marriage, or birth of a child must be "written". No such requirement exists in current §§ 3.204(a)(1) or 3.213(a) and (c). We have therefore not included this requirement in §§ 5.151(c), 5.181(b), 5.182(a), 5.183(a) or (b), 5.192(c), 5.193, 5.221(b), or 5.229.

§ 5.182 Changes in Status of Dependents

We propose to combine the contents of initially proposed §§ 5.181 and 5.182 into § 5.182, and reorganize and simplify the rules. In the revised rule, we refer in proposed

§ 5.182(a) to a beneficiary's duty to report a "[c]hange in status of a living child affecting who no longer meets the definition of a dependent". This language replaces language in the initially proposed § 5.182(a)(2) that had specifically discussed discontinuance of school attendance. The broader language in the proposed rule more accurately describes a beneficiary's duty to report any change in a child's status that makes the child no longer a dependent of the beneficiary.

In initially proposed paragraph (a), we stated that a beneficiary must provide VA a statement containing the details of any change in dependency that could lead to a reduction or discontinuance of VA benefits. We required that the beneficiary report the month and year of the change. VA now requires the day, as well as the month and year of the change. We also require the city and state, or country if outside of a state, where the change occurred. See VA Form 21-686c, Declaration of Status of Dependents. We propose to amend paragraph (a) to conform to VA's current practice.

We propose to remove the cross reference to § 3.217, ''Submission of statements or information affecting entitlement to benefits", which was contained in initially proposed § 5.181(b) because § 5.182 contains all the relevant information needed to understand changes in dependency and so the cross reference is unnecessary.

We propose to move what was initially proposed paragraph § 5.181(c) to proposed § 5.184(d) because it is an effective-date rule specific to § 5.184.

§ 5.183 Effective Date of Award of Benefits for a Dependent

Initially proposed § 5.183 stated that the effective date for adding a dependent is the date VA receives notice of the existence of the dependent. We propose to change "notice" to "information". In proposed § 5.1, we define notice as a written document that VA sends to the claimant or beneficiary. To state that VA receives notice of the dependent would be contrary to our proposed definition of the term. We mean to say that a dependent will be added upon receipt of information of the existence of such dependent. We also propose to state that the "information" must be filed by the claimant or beneficiary. As stated in proposed § 5.181, this regulation is limited to adding dependents, therefore, a claimant or beneficiary may establish a dependent to a new or existing award. This clarification does not constitute a change from the proposed rule.

Initially proposed § 5.183(a) stated that evidence of dependency must be received within 1 year "of" VA's request. We propose to clarify the regulation to state that the evidence must be received "no later than 1 year after" VA's request in order to eliminate ambiguity with regards to the date of submission of evidence. We have made similar changes throughout this regulation, and throughout this document, where we previously stated "1 year of" to now state "1 year after". These additional changes to this rule are intended to simplify the general rule and the exceptions thereto. Notably, we propose to move paragraph (c) into paragraph (a) and reorganize paragraph (a).

Initially proposed § 5.183(b)(3) stated the effective date for establishing the dependency of an adopted child. However, it did not specify that in order for these dates to apply, VA must receive information of the adoption no later than 1 year after the event. We therefore propose to correct this omission by stating "For an adoption, the earliest of the following dates, as applicable, if VA receives information about the adoption no later than 1 year after the adoption". This change is consistent with § 3.401(b)(1)(i) and current practice.

§ 5.184 Effective Dates of Reductions or Discontinuances Based on an Event that Changes Dependency Status

We propose to combine the effective date provisions of initially proposed §§ 5.181(c), 5.184, and 5.198 into one section to make them easier to find and to avoid redundancy. We propose to mark § 5.198 as reserved.

As initially proposed, we referred to a marriage, divorce, annulment, or death as a "change" in dependency status. However, these are "events" that result in "changes" in dependency status. For clarity, we propose to refer to these as an "event that changes" dependency status.

In initially proposed § 5.198(b), we stated, "VA will pay the reduced rate or discontinue benefits effective the first day of the month that follows the month in which the divorce or annulment occurred." We have determined that the term "occurred" was ambiguous because under some states' laws, the divorce or annulment does not take

effect immediately after the court issues the decree. We therefore propose to revise this language to state, "VA will pay . . . in which the death occurred or in which the divorce or annulment became effective." For the same reason, we propose to make a conforming change to § 5.205(b)(1) and (2), regarding annulment, and (c)(1) and (2), regarding divorce.

§ 5.190 Status as a Spouse

We have determined that there is no need to establish a rule for "status" as a spouse. First, the term is plain language and does not need a specialized definition for VA purposes (unlike, for example, the term "surviving spouse", which does have a specialized meaning). There can be no question that a reference to a "spouse" is a reference to a person's marriage partner. Second, proposed § 5.191 more than adequately defines a valid marriage for VA purposes. To the extent that proposed § 5.190 had implemented the 38 U.S.C. 101(31) requirement that a spouse be of the opposite sex, that requirement is contained in proposed § 5.191. Hence, we propose to delete this rule and mark § 5.190 as reserved.

§ 5.191 Marriages VA Recognizes as Valid

Initially proposed § 5.191 referred to deemed-valid marriages as an exception to the general rule set forth in this section. However, a deemed-valid marriage is not an exception to the types of marriages recognized by VA; rather, it is one type of such marriages. Therefore, we propose to restructure § 5.191 and add a paragraph (c). In addition, we propose to change the term "is" valid to "was" valid. Because the laws of

the states may change, we want to specify that the marriage had to be valid at the time that it occurred. Finally, we propose to change the phrase "the right to benefits" in § 5.191(b) to "entitlement to benefits". This change improves clarity and is consistent with the language of other part 5 VA regulations.

Initially proposed § 5.191(a) and (b) used the term "parties" to mean "persons", as stated in the introductory sentence. In order to avoid confusion, we propose to change the term "parties" to "persons" in paragraphs (a) and (b).

§ 5.192 Evidence of Marriage

As stated in our discussion of § 5.181 above, VA requires the first type of evidence listed in the relevant section as proof of a certain relationship, if it is obtainable. If it is unobtainable, then VA will accept the next listed type of evidence that is obtainable to prove the relationship. In part 3, this basic principle is stated in 38 CFR 3.204(b), which refers the reader to §§ 3.205 through 3.211. It is helpful to state this principle in each section where it applies, and we therefore propose to state it in §§ 5.192(c), 5.221(b)(2), 5.229, and 5.500.

§ 5.193 Proof of Marriage Termination Where Evidence is in Conflict or Termination is Contested

We propose to make minor revisions to § 5.193 for clarity.

§ 5.194 Acceptance of Divorce Decrees

We propose to make minor revisions to § 5.194 for clarity.

§ 5.196 Void or Annulled Marriages

We propose to combine initially proposed §§ 5.195 and 5.196 to improve clarity and eliminate the need for users to refer to two regulations to address the issue of void or annulled marriages. The content of both initially proposed regulations would now appear in § 5.196. Section 5.196(a)(1) was initially proposed as § 5.195. Section 5.196 was initially proposed as § 5.196(a). We propose to mark § 5.195 as reserved.

One commenter questioned VA's authority to determine whether a marriage was void in accordance with the law of the place that governs the marriage's validity. The commenter opines that 38 U.S.C. 103(c) does not appear to provide VA with jurisdiction or authority to make an independent adjudication on the validity of a veteran's marriage.

As stated in the preamble to the initially proposed rule, current part 3 includes references to "void" marriages, but it does not explain the meaning of a "void" marriage. See 38 CFR 3.207(a). Under 38 U.S.C. 103, VA does have the authority to make adjudicative decisions on the validity or legality of a marriage when determining whether or not a person is or was a spouse of a veteran for VA purposes. The commenter's suggested interpretation that the statute merely allows for the recognition of marriage notwithstanding contrary state law is not consistent with the "whether or not" wording of the statute or with VA's long-standing interpretation of the statute. The statute provides that determinations of validity of marriage be made according to the law of the place

where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued. This does not mean VA is adjudicating the status of the marriage for purposes of state civil law, which the commenter seems to misunderstand VA to be doing. We therefore propose to make no changes based on this comment.

This commenter further suggests that any new rule regarding VA's authority to determine the validity of a marriage as it pertains to a veteran's surviving spouse or a veteran's child, should include a procedural reference of such questions to the Regional Counsel because VA adjudicators are generally not equipped to research and determine such matters. We agree with this suggestion. In fact, VA has long-standing procedural guidelines for determination of a void marriage. In such cases, the Veterans Service Representative collects all of the pertinent information and evidence from the claimant and files the case with Regional Counsel for a legal opinion as to whether or not the marriage is void. To implement this suggestion, we have revised proposed § 5.196 to indicate that VA Regional Counsel will make the determination concerning whether a marriage is void under the law of the place that governs the validity of the marriage.

§ 5.200 Surviving Spouse: Requirement of Valid Marriage to Veteran

We propose to reorganize initially proposed §§ 5.200 and 5.201 to eliminate redundancy and potentially confusing cross referencing, and to significantly clarify the rules. First, we propose to renumber initially proposed § 5.201 as § 5.200. We have

also renamed the rule as, “Surviving spouse: Requirement of valid marriage to veteran.” This title is more descriptive of the rules within this section. This reorganization is for clarity and simplification.

In § 5.200(a), we propose to simplify several initially proposed paragraphs to state that in order to qualify as a surviving spouse, the marriage between the veteran and the person by or for whom surviving-spouse status is sought must have met the requirements of § 5.191, unless the “deemed valid” exception in paragraph (b) applies.

In § 5.200(b)(1), we clarify that there must have been an attempt at legal marriage and that the person seeking surviving-spouse status must have believed that a valid marriage resulted and lasted until the veteran died. This is not a change from current practice. We also clarify that the marriage must have lasted for 1 year unless the person had a child with the veteran. The proposed rule had required that a child have been both “of or before the marriage”; however, because the marriage must have continued until the veteran died, the result is that the child may have been born at any time. Thus, the simplified language in § 5.201(b)(1) is not substantively different from the current and proposed rules.

Initially proposed § 5.201(c) did not clearly define the phrase “no knowledge of legal impediment”. We propose to clarify the definition of legal impediment in initially proposed § 5.201(c), which is now renumbered as § 5.200(b)(2). This clarification is consistent with current practice. We also propose to clarify the evidence that the person

must file under § 5.192(c), the requirements of which must be met under § 5.200, without any contradictory evidence.

We also propose to reword the regulation text in § 5.201(e), which is now renumbered as § 5.200(b)(4), for clarity.

§ 5.201 Surviving Spouse: Requirements for Relationship with the Veteran

We propose to renumber initially proposed § 5.200 as § 5.201, and rename the section, "Surviving spouse: Requirements for relationship with the veteran". This title is more descriptive of the rules within this section. This reorganization was made for clarity and simplification.

Initially proposed § 5.200(a)(2) (now renumbered as § 5.201(a)) specified that to qualify as a surviving spouse, that person must have been a member of the opposite sex from the veteran. Because § 5.191, "Marriages VA recognizes as valid", requires that a valid marriage must be to a person of the opposite sex, that provision is unnecessary in § 5.201(a) and we propose to remove it. We also propose to make several changes to improve clarity and consistency with the language of other VA regulations.

We propose to move the content of initially proposed § 5.430(b), "Marriage date requirements for Improved Death Pension", to § 5.201(b)(1), "More than one marriage

to the veteran." The content is based on 38 U.S.C. 103(b), which is not limited to just Improved Pension.

We propose to clarify the provision concerning whether a separation was temporary, initially proposed as § 5.200(b)(3). In § 5.201(b)(4) we propose to add the term "with estrangement" to modify "separation" to accurately reflect the circumstances to which paragraph (b)(4) applies.

§ 5.203 Effect of Remarriage on a Surviving Spouse's Benefits

The preamble to initially proposed § 5.203(a) stated that it would be a new provision, restating part 38 U.S.C. 101(3), the statutory definition of surviving spouse. Part 3 restates the statutory definition of surviving spouse in § 3.50(b). As a result of the elimination of initially proposed §§ 5.200 and 5.202, and the incorporation of some of those initially proposed provisions in currently proposed § 5.203, we now propose to restate § 3.50(b)(2) in § 5.203(a)(2).

Initially proposed § 5.202 concerned the effect of a Federal court decision on a remarriage determination. We propose to mark § 5.202 as reserved, and include this rule in § 5.203(a)(1). We also propose to change the regulation text in proposed § 5.203(a)(1) from "In determining eligibility for pension, death compensation, or dependency and indemnity compensation" to "In determining eligibility for benefits" to clarify that the rule applies to all benefits based on surviving-spouse status. It simplifies the regulation.

We propose to revise the language of initially proposed paragraph (c)(4), now redesignated as (d)(4), by removing the phrase “openly to the public”. That phrase is unnecessary because that provision is already stated in paragraph (a)(2). For the same reason, we have removed that phrase from initially proposed paragraph (d)(1)(iii), now redesignated as paragraph (e)(1)(iii).

One commenter questioned why there was a rule that allowed reinstatement of benefits to a surviving spouse who is no longer remarried because of the death of the second spouse, but there was no rule that allowed the surviving spouse to establish her initial entitlement to benefits after the death of her second spouse. The commenter provided the following example. A surviving spouse is married to the veteran for over 30 years. The veteran subsequently dies and the surviving spouse remarries, but the surviving spouse’s second husband dies after several years of marriage. After the death of her second husband, the surviving spouse wants to claim VA benefits. The commenter further indicated that VA allows for the surviving spouse to receive benefits only if her second husband died before November 1, 1990, but in the scenario that was presented, the veteran died in January 1991. The commenter contends that the surviving spouse would not be entitled to benefits because this is not considered to be a reinstatement of benefits, but rather a first-time application. Initially proposed § 5.203(c) stated that the surviving spouse of the veteran may be entitled to receive benefits if the remarriage ended before November 1, 1990. This rule corroborates the commenter’s statement. However, initially proposed § 5.203(d) (now § 5.203(e)) allowed a surviving

spouse to be eligible for benefits if he or she was otherwise ineligible for DIC under the laws in effect prior to June 9, 1998, because of the surviving spouse's remarriage after the veteran's death. Although the surviving spouse's eligibility to DIC is said to be reinstated under § 5.203(e), this section applies to reopened as well as original claims. The limitation is that no payments may be issued for any period before October 1, 1998. Because proposed § 5.203(e) already addresses the concerns of the commenter, we propose to take no action based on this comment.

We propose to clarify § 5.203(e)(2) to state that no payments may be made for any period before October 1, 1998. The regulation text stated the month, and year, but failed to state the date. The exact date is needed in order to avoid an erroneous payment.

We also propose to clarify § 5.203(f)(2) to state that no payments may be made for any period before January 1, 2004. The regulation text stated the month and year, but failed to state the date. The exact date is needed in order to avoid an erroneous payment.

§ 5.220 Status as a Child for VA Benefit Purposes

We propose to reword the introductory text in § 5.220 for clarity by improving sentence structure.

Initially proposed § 5.220(a), began with the exception prior to the rule. To improve readability, we propose to place the exception at the end of the general rule.

In nitially proposed § 5.220(b)(2)(i), which is now paragraph (b)(1), we referred to a child who is "incapable of self-support through his or her own efforts by reason of physical or mental disability". We propose to eliminate the phrase "through his or her own efforts" because it is redundant of "self-support" and might be misinterpreted to mean that the child intentionally caused his or her incapacity, which is clearly not what we intended.

We propose to move the content of initially proposed § 5.220(c)(2) to § 5.226(c). Section 5.226(c) elaborates on the criteria set forth in § 5.220(c)(2). This approach also enables us to eliminate the need to refer back to § 5.220 in § 5.226(c). We will leave § 5.220(c)(2) as a cross-reference to § 5.226.

We propose to add a new paragraph (d) to proposed § 5.220. In accordance with § 3.503(a)(2), this new paragraph would provide that a person is still considered a child of a veteran even if the person has entered active duty.

§ 5.221 Evidence to Establish a Parent/Natural Child Relationship

We propose to reword the regulation text in § 5.221(a)(2) for clarity.

We propose to delete § 5.221(a)(2) – Note. The content of the Note is adequately covered in § 5.220(c)(2), so it is unnecessary.

Initially proposed § 5.221(b)(2)(iii)(A) limited evidence of paternity to church records of baptism without referencing other religions. We propose to revise the rule to allow any "religious-context record documenting the birth of the child" in order to eliminate any perceived bias for or against a particular religion or faith. We propose to add similar language to § 5.229(b).

§ 5.222 Evidence to Establish an Adopted Child Relationship

We propose to add a sentence to the initially proposed undesignated first paragraph to state the purpose of this section. We propose to make technical revisions to § 5.222 to clarify that this rule is an exception to § 5.181(b). We propose to make similar clarifications to §§ 5.223 and 5.224.

We propose to add an order of preference of types of evidence VA requires to prove an adopted child relationship. We explained orders of preference for evidence in our discussion of § 5.181.

§ 5.223 Child adopted after a veteran's death.

Originally proposed § 5.223 (a) (now (b)) required, inter alia, that, "The person adopted was living in the veteran's household at the time of the veteran's death. . ." This language was based on § 3.57(c)(1). Upon further review, we note that §

3.210(c)(2) uses the phrase “was a member of the veteran’s household” to describe the same criteria for children adopted after a veteran’s death. To make § 5.223(b) consistent with similar provisions in part 5 (§§ 5.220, 5.226, 5.233, 5.332) we propose to change the paragraph to read, “was a member of the veteran’s household”. We therefore propose not to restate the language of § 3.57(c)(1) and (3) in part 5 because it is redundant of the language in § 3.210(c)(2).

§ 5.225 Child Status Based on Adoption into a Veteran’s Family Under Foreign Law

Our definition of “State” in § 5.1 includes territories and possessions of the US. Therefore it is unnecessary to include the Commonwealth of the Northern Mariana Islands in this section. We propose to remove it.

§ 5.227 Child Status Based on Permanent Incapacity for Self-support

We have clarified the regulation text in § 5.227(b)(1)(iv). The initially proposed rule said that “evidence that a person was not employed before or after reaching 18 years old tends to show incapacity for self support when the lack of employment was due to the person’s physical or mental disabilities and not due to unwillingness to work or other factors unrelated to the person’s disability.” We believe that the phrase “before or after reaching 18 years old” could be unclear and we therefore propose to clearly state that the rule applies to a person who “has never been employed”.

We propose to revise initially proposed § 5.227(c) to clarify that this rule does not exclude from consideration any particular evidence or require that any evidence should

be treated more favorably. The rule simply provides guidance to VA employees and to the public about likely sources of evidence relevant to the question whether a person is permanently incapacitated.

§ 5.228 Exceptions Applicable to Termination of Child Status Based on Marriage of the Child

We propose to add an introductory sentence to give context to initially proposed § 5.228.

§ 5.229 Proof of Age or Birth

We propose to revise initially proposed § 5.229 to clearly state that the evidence described therein must be provided in accordance with the order of preference in which it is listed, as discussed earlier in proposed § 5.192, and have also reorganized the rule to improve readability.

In addition, we propose to remove the cross reference to § 5.180(e) (now § 5.181(d)), ‘‘Acceptability of photocopies”. That paragraph applies equally to all of the sections listed in § 5.181(c), so there is no need to reference it in any of those sections.

In the initially proposed paragraph (a)(4) we inadvertently changed the persons who could certify a birth. We stated that a claimant or beneficiary could prove age or birth with “[a]n affidavit or certified statement from a physician or midwife present during the birth”. However, 38 CFR 3.209(d), from which this paragraph derives, allows proof

of age or birth with an "[a]ffidavit or a certified statement of the physician or midwife in attendance at birth". We propose to use this language because it is a more precise statement of the requirement.

§ 5.230 Effective Date of Award of Pension or Dependency and Indemnity Compensation to, or for, a Child Born After the Veteran's Death

We propose to reword the section for clarity.

§ 5.234 Effective Date of an Award, Reduction, or Discontinuance of Benefits Based on Child Status Due to Permanent Incapacity for Self-support.

We propose to restructure initially proposed § 5.234(a), by creating separate paragraphs (a)(1) and (2) for effective dates of awards and for reductions and discontinuances. We believe this structure will better inform readers on the contents of this section.

§ 5.238 Status as Veteran's Parent

In initially proposed § 5.240(c) we stated that the term "parent" includes a natural mother or father of an illegitimate child "if the usual family relationship existed." Upon further review, we have determined that there is no statutory or regulatory authority for this provision, and we therefore propose to remove it.

Comment Relating to a Different Portion of This Rulemaking

A comment was submitted by a member of the public concerning title 32 National Guard troops suggesting that their active duty for training be considered as "active duty", thereby allowing them veteran status. This comment is outside the scope of this proposed rule published under RIN 2900-AL94, but is relevant to another NPRM, RIN 2900-AL67, "Service Requirements for Veterans". This comment was addressed together with all of the other submissions received in connection with RIN 2900-AL67.

Changes in Terminology for Clarity and/or Consistency

We also propose to correct our use of the terms "claim" and "application". Under 38 CFR 3.1(p), "Claim—Application" is defined as "a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit". As stated in initially proposed § 5.1, for purposes of part 5, "claim means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a VA benefit under this part" and as stated in proposed § 5.1, "application means a specific form required by the Secretary that a claimant must file to apply for a benefit". We similarly propose to edit the part 5 regulations proposed in AL94 to correct other inconsistencies in terminology.

X. Subpart E: Claims for Service Connection and Disability Compensation

Service-Connected and Other Disability Compensation

A. Service-Connected and Other Disability Compensation

In a document published in the Federal Register on September 1, 2010, we proposed to revise VA regulations governing service-connected and other disability compensation. See 75 FR 53744. We provided a 60-day comment period that ended November 1, 2010. We received submissions from 10 commenters: National Organization of Veterans Advocates, National Veterans Legal Services Program, Paralyzed Veterans of America, Vietnam Veterans of America, and six members of the general public.

One AM07 commenter commended VA "for the hard work and dedication that its personnel have put into this important project" and stated that, "Overall. . . VA did achieve its goals to make its service-connected regulations 'logical, claimant-focused and user friendly[.]'"

One commenter stated that while the general idea of the proposed rule is good, some of the proposed changes may be adverse to veterans. However, the commenter did not specifically explain which changes might be adverse. The commenter also urged that VA offer online access to court decisions cited in its rulemaking documents.

Because the commenter did not specifically explain which changes might be adverse to veterans, we cannot respond to that assertion, and we propose to make no change based on that comment. Regarding the suggestion on court decisions, we note that decisions of the U.S. Court of Appeals for Veterans Claims are available on their website at www.courts.cavc.gov and decisions of the U.S. Court of Appeals for the

Federal Circuit are available at http://www.cafc.courts.gov. We therefore propose to make no changes based on these comments.

Another commenter asserted that because of the complexity of the regulations proposed in AM07, veterans will incur very expensive legal costs in order to interpret them and determine what benefits they are entitled to. The commenter urged VA to add a section at the end of part 5 outlining what a veteran's options are if the veteran disagrees with a VA decision. The commenter also suggested that VA provide a telephone number to call in the event that a veteran does not understand the final rule on part 5.

VA's intent in rewriting these regulations was to make them less complex. To the extent that commenter believes that he or she requires assistance in preparing a claim for benefits, VA has recognized 87 Veterans Service Organizations (VSO) for purposes of providing no-cost assistance with claims for VA benefits. Each of these VSOs has accredited representatives available to help veterans in preparing claims. A searchable list of recognized VSOs and accredited representatives is available at http://www.va.gov/ogc/apps/accreditation/index.asp.

The regulations on how to file a notice of disagreement with a VA decision are found in 38 CFR parts 19-20, not in part 3, so that comment is outside the scope of this rulemaking. VA does not offer a phone number for purpose of explaining its regulations; we do not believe that would be an efficient use of government resources. But VA does

have a number where veterans can call to inquire about the status of their benefits claims (1-800-827-1000), which veterans find very helpful. For these reasons, we propose to make no changes based on this comment.

One commenter stated that he is opposed to "patient registries" in the prescription process and that all drugs should be taken or not at the discretion of the patient with the advice of his or her doctor. Because this comment is outside the scope of this rulemaking, we propose to make no change.

One commenter urged that VA suspend its Regulation Rewrite Project until it is shown how the implementation of part 5 will interact with certain other VA programs: Virtual VA, Virtual Regional Office and the Veterans Benefits Management System. We do not believe that the implementation of part 5 will disrupt those information technology systems because they were designed to accommodate changes in law or regulation. VA will attempt to implement part 5 in a manner that causes the minimum possible disruption to VA claims processing operations. We believe that over the long term, having clear regulations for our employees to apply will significantly improve timeliness and accuracy in claims processing.

§ 5.242 General principles of service connection.

Initially proposed § 5.242(a) states that "VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran's service.. . ." One commenter suggested that we insert the phrase "and records

constructively in the VA's possession" after "evidence", to ensure that VA complies with the constructive possession rule set forth in Bell v. Derwinski, 2 Vet. App. 611 (1992).

We do not believe it is necessary to include Bell's constructive possession rule in VA regulations, and doing so might actually confuse readers. Any evidence that is constructively in VA's possession would already be encompassed by the rule in § 5.4(b) that VA decisions will be based on a review of the entire record. Adding that this includes evidence within VA's possession and which could reasonably be expected to be a part of the record could imply a requirement that the agency of original jurisdiction (AOJ) must consider material that is not actually in the record, which would be impossible. Furthermore, if the AOJ is aware of such evidence and it is "necessary to substantiate the claim", then the AOJ is already under a duty to obtain it and add it to the record (see 38 CFR 3.159, to be codified in part 5 as § 5.90). We therefore propose to make no change based on this comment.

One commenter expressed concern that we did not repeat in proposed § 5.242 the following language from 38 CFR 3.303(a): "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."

We inadvertently failed to explain why we did not include this language in initially proposed § 5.242. Because proposed § 5.4(b) would clearly state that "VA will base its decisions on a review of the entire record", we believe it would be redundant and

possibly confusing to restate this principle in specific sections in part 5 (as does part 3). Similarly, § 5.4(b) states:

> It is VA's defined and consistently applied policy to administer the law under a broad interpretation, consistent with the facts shown in every case. VA will make decisions that grant every benefit that the law supports while at the same time protecting the interests of the Government.

Since this language is substantially the same as the language quoted by the commenter, and it applies to all VA claims rather than just service connection, there is no need to repeat it in § 5.242.

One commenter urged VA to establish a new policy by revising initially proposed § 5.242 to create a presumption based on H.R. 1490, 110th Congress, 1st session. The commenter suggested that VA include the following language in § 5.242(c):

> (1) A claimant presenting a claim for benefits with respect to a service-connected disability or death shall be presumed to have presented a valid claim of service connectedness, subject to the requirements of subparagraph (2), unless the Secretary determines that there is clear and convincing evidence to the contrary.
>
> (2) A claimant presenting a claim described under subparagraph (1) shall be required to support such claim with proof of service referred to in such claim, and a brief description of the nature, including the connection to such service, of the disability or claim.

The commenter asserted that this presumption would allow VA to quickly process backlogged claims.

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve

as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.243 Establishing service connection.

Two commenters expressed concern that VA's use of the term "proximately caused" in proposed § 5.243(a) would improperly narrow the criteria for showing incurrence or aggravation. One of these commenters believed that using the term would improperly import a restrictive tort law concept into VA's regulations on service connection. Although this was not our intent, to avoid any such misinterpretation, we propose to revise the term to "due to or the result of" as suggested by one of the commenters. For the same reason, we propose to make the same revision in §§ 5.246 and 5.247.

One of these commenters also rejected the use of term "caused by" in proposed § 5.241(a) and (b), which the commenter suggested be changed to "'incurred' or 'aggravated'" (as in current 38 CFR 3.1(k) and 3.303(a)) or "related to". The commenter similarly, urged VA to replace "proximately caused" in proposed § 5.243(a) with "related to" and "causal link" in proposed § 5.243(a)(3) with "relationship." The commenter acknowledged that, as we noted in the preamble to proposed § 5.243, the court in Shedden v. Principi, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004) explained that service connection requires "a causal relationship between the present disability and the disease or injury incurred or aggravated during service'' (citing Caluza v. Brown, 7 Vet. App. 498, 505 (1995)). Nevertheless, the commenter believed that use of the causation

terms that VA proposed in §§ 5.241 and 5.243 will cause confusion by imposing a "strict medical standard" in cases where it would be "inappropriate and excessive." The commenter asserted that diseases such as tempromandibular joint syndrome and ulcers "may not be susceptible to definitive proof that the disease was 'caused by' the incident in service." The commenter also noted that VA has determined that there is a positive association between herbicides and three medical conditions "even though there is no proof that exposure to herbicides caused veterans to develop the conditions."

As a preliminary matter, we note that the language "proximately caused" in proposed § 5.243(a) was merely a recitation of the title of proposed § 5.246, rather than regulation text. More fundamentally, we note that the "causal relationship" principle set forth in the Caluza case is a well established principle of veterans law and no court has held that it is in any way inconsistent with the regulatory language in §§ 3.1(k) or 3.303(a). We disagree with the assertion that the use of the terms that VA proposed will cause confusion by imposing a "strict medical standard" in cases where it would be "inappropriate and excessive" and the commenter offers no support for this assertion. We likewise disagree with the assertion that the proposed rules would impose some new "definitive proof" standard for diseases such as temporomandibular joint syndrome and ulcers, and again the commenter offers no support for this assertion. Regarding the commenter's statement that VA has determined that there is a positive association between herbicides and three medical conditions "even though there is no proof that exposure to herbicides caused veterans to develop the conditions", we note that this

determination was made pursuant to an entirely different statute (38 U.S.C. 1116) than the statutes that authorize the causation terms used in §§ 5.241 and 5.243 (38 U.S.C. 1110 and 1131). Our use of the causation terms in §§ 5.241 and 5.243 will express the same concepts as stated in §§ 3.1(k) or 3.303(a), with no substantive change, and in a way that is more clear to those using the regulations. For these reasons, we propose to make no changes based on these comments.

One commenter urged that, in order to comply with the standard for continuity of symptomatology contained in Savage v. Gober, 10 Vet. App. 488, 498 (1997), VA should revise initially proposed § 5.243(d) by inserting "injury or disease" before **"**or signs or symptoms" in paragraphs (d)(1) and (2) and also in paragraph (d)(3). For the same reason, the commenter also suggested that VA revise paragraph (d)(3) to read, "(3) Competent evidence relates a present injury or disease or present signs or symptoms to the injury or disease or signs or symptoms which occurred during service or during an applicable presumptive period for a disease."

Regarding the suggested additions to paragraphs (d)(1) and (2), we note that the Savage court summarized the continuity provision of 38 CFR 3.303(b) as follows:

> In sum, then, the rule here established is as follows. . . If the chronicity provision is not applicable, a claim may still be well grounded or reopened on the basis of § 3.303(b) if the condition is observed during service or any applicable presumption period, continuity of symptomatology is demonstrated thereafter, and competent evidence relates the present condition to that symptomatology.

Id.

In initially proposed § 5.243(d)(1) we incorporated the requirement, as stated by the Savage court, "that the condition [was] observed during service or any applicable

presumption period" with the phrase "signs or symptoms of an injury or disease during active military service or during an applicable presumptive period." In initially proposed paragraph (d)(2) we incorporated the requirement, as stated by the court, that "continuity of symptomatology [was] demonstrated thereafter" with the phrase "The signs or symptoms continued from the time of discharge. . . until the present." In initially proposed paragraph (d)(3) we incorporated the requirement, as stated by the court, "that competent evidence relates the present condition to that symptomatology" with the phrase "The signs or symptoms currently demonstrated are signs or symptoms of an injury or disease, or the residuals of an injury or disease, to which paragraph (d)(1) of this section refers."

We believe that the language of initially proposed § 5.243(d) accurately restates the intent of current § 3.303(b) as summarized by the *Savage* court. As the court stated, the keys to the continuity doctrine are that "the condition is observed [through signs or symptoms] during service or any applicable presumption period, continuity of symptomatology [i.e. signs or symptoms] is demonstrated thereafter, and competent evidence relates the present condition to that symptomatology." Savage, 10 Vet. App. at 498. Following the commenter's suggestion of inserting "injury or disease" would introduce a new element to the doctrine which is not found in § 3.303(b) nor the court cases interpreting that paragraph. Moreover, it would risk confusing readers by blurring the line between the chronicity doctrine and the continuity doctrine. For these reasons, we propose to make no change based on this comment.

Since we published AM07, "Service-Connected and Other Disability Compensation" 75 FR 53744 (Sept. 1, 2010), VA has determined that initially proposed § 5.243 did not accurately restate current § 3.303(b) in the following respect. Section 5.243 would have made "continuity of symptomatology" a separate method of showing service connection distinct from the "chronicity" method set forth in § 3.303(b). In Walker v. Shinseki, 708 F.3d 1331 (Fed. Cir. 2013), the U.S. Court of Appeals for the Federal Circuit explained the correct interpretation of these § 3.303(b) provisions. The Court held that continuity of symptomatology is actually a means of proving the existence of a chronic disease during military service or an applicable presumptive period. We now propose to correct the error contained in the NPRM by revising the provisions of initially proposed § 5.243(d), which we are moving into paragraph (c).

In addition to misstating the role of continuity of symptomatology, we erroneously stated in initially proposed §5.243 that the term "chronic disease" included other diseases besides those listed in current § 3.309(a). The Walker court clarified that the term "chronic disease", as used in § 3.303(b), means only a disease listed in § 3.309(a) and no others. Id. at 1338. We propose to clarify this point in § 5.243(c)(2).

Lastly, we note that initially proposed paragraph (d)(2), which stated, "The signs or symptoms continued from the time of discharge or release from active military service until the present", omitted a presumptive period. To correct this omission, we propose to insert "or from the end of an applicable presumptive period for a disease" in § 5.243.

In AM07, we stated:

> VA's long-standing practice is to apply the principles of chronicity and continuity to residuals of injury. This practice provides a fair and efficient means to determine service connection in certain cases, and it is logical to apply these principles to injuries as well as to diseases. Therefore, proposed § 5.243(c)(1) would also apply to an injury incurred or aggravated in service where the current disability is due to "the chronic residuals of the same injury."

The court rejected the argument that § 3.303(b) applies to injuries as well as to chronic diseases, stating, "We thus reject Walker's broader argument that continuity of symptomatology in § 3.303(b) has any role other than to afford an alternative route to service connection for specific chronic diseases." Id. The court also noted that, "The Secretary is free to amend § 3.309(a) if he determines that chronic diseases beyond those currently listed should benefit from the application of § 3.303(b)," and noted that, "the Secretary is currently considering a substantial revision of his regulations concerning service connection for disability compensation", referring to VA's Regulation Rewrite Project. Id.

As stated above in this preamble, our Veterans Benefits Administration's Transformation Plan will use improved technology and work methods to process disability claims more efficiently. VA has determined that significantly revising the substantive content of our service connection regulations at this time might interfere with this transformation. Moreover, further study is needed to determine the potential impact of such changes, after which VA may conduct a separate rulemaking for this purpose. We therefore propose not to include injuries in § 5.243(c).

§ 5.244 Presumption of sound condition on entry into military service.

Initially proposed § 5.244(c)(2) stated, “The presumption of sound condition is rebuttable even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.”

One commenter urged that VA clarify paragraph (c)(2) by revising it to read, “The presumption of sound condition is rebuttable, in accordance with subsection (d)(1), below, even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, provided other evidence of record is sufficient to overcome the presumption.” The commenter asserted that this revision is needed to ensure the paragraph complies with Kent v. Principi, 389 F.3d 1380, 1383 (Fed. Cir. 2004).

As we stated in the preamble to AM07, we added paragraph (c)(2), which has no part 3 counterpart, to incorporate the Kent holding into VA regulations. The commenter offers no explanation of how initially proposed paragraph (c)(2) is inconsistent with Kent nor how it is unclear in any way. Furthermore, the clear and unmistakable evidence standard of paragraph already applies to rebuttal of the presumption of service connection. We therefore make no change based on this comment.

We propose to exclude initially proposed § 5.244(b) because it is contrary to judicial interpretation of 38 U.S.C. 1111. Smith v. Shinseki, 24 Vet. App. 40 (2010); Crowe v. Brown, 7 Vet. App. 238 (1994). Proposed § 5.244, the part 5 counterpart of

38 CFR 3.304(b), would implement 38 U.S.C. 1111, the presumption of sound condition. We initially proposed paragraph (b), which has no part 3 counterpart, to "clarify that the presumption of sound condition attaches even if the military service department did not conduct an entry medical examination, or if there is no record of an entry examination." 75 Fed. Reg. 53744, 53750 (Sep. 1, 2010). We explained that "if there was no entry medical examination, then there could be no 'defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment' that would serve to prevent the presumption from arising." Id.

Initially proposed at 75 FR 53764, paragraph (b) described a report of entry examination not a condition for application of the presumption as a presumption of sound condition applies even if:

- The veteran did not have a medical examination for entry into active military service; or
- There is no record of the examination.

In drafting paragraph (b), we overlooked precedent decisions of the U.S. Court of Appeals for Veterans Claims (CAVC) that held that 38 U.S.C. 1111 requires an entry examination for the presumption to apply. In Smith, the court stated that section 1111 "provides that the presumption applies when a veteran has been 'examined, accepted, and enrolled for service.'" 24 Vet. App. at 45. The court said, "Plainly, the statute requires that there be an examination prior to entry into the period of service on which

the claim is based." Id. Although Ms. Smith "attained veteran status because she served the required period of active duty service," id. at 44, the presumption could not apply in her case because there was no evidence of "an examination made contemporaneous with [her] entry" into the periods of active duty for training with the National Guard on which she based her claim. Id. at 46.

The court explained that "[i]n the absence of such an examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim is based." Id. at 45. The court's reason why the statute precludes applying the presumption when there was no contemporaneous entry examination, or no evidence of one, was essentially the opposite of our reason why the presumption could apply in those situations.

In Crowe, 7 Vet. App. at 245 (1994), the court stated that the presumption of sound condition "attaches only where there has been an induction examination in which the later-complained-of disability was not detected." Though the court focused on the term "noted" in section 1111, as VA interpreted the term in 38 CFR 3.304(b), the statement is direct and unequivocal.

Neither Smith nor Crowe was a case of a claimant for disability compensation who sought to apply the presumption of sound condition to a period of active duty even though he or she had no entry examination. Neither Smith nor Crowe was a case of a veteran of active duty who claimed to have had an entry examination, but there is no

record of it. Nonetheless, both decisions made unequivocal statements that mean, in essence, if there was no entry examination, the presumption cannot apply. VA must give deference to the court's interpretation of the plain meaning of a statute. See Cypert v. Peake, 22 Vet. App. 307, 311 (2008) (Deference to department's regulation not warranted when its interpretation of a statute is contrary to the plain meaning of the statutory language). We conclude that the court's interpretation of § 1111 in both cases precludes initially proposed § 5.244(b). Consequently, we have removed it from proposed part 5. We also propose to redesignate paragraphs (c) and (d) as (b) and (c), respectively.

In proposed rule AM07, "Service-Connected and Other Disability Compensation," 75 FR 53744 (Sept. 1, 2010), we in advertently omitted the first five sentences of current § 3.303(c). We now propose to insert these sentences, with only minor stylistic changes to improve readability, as § 5.244(d).

§ 5.245 Service connection based on aggravation of preservice injury or disease.

Initially proposed § 5.245(b)(3) stated the usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

One commenter urged that VA clarify paragraph (b)(3) by revising it to read:

(3) Effects of medical or surgical treatment. Where medical evidence

> establishes by clear and convincing evidence that the usual effects of medical or surgical treatment provided to a veteran in service to ameliorate a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, do not constitute an increase in the severity of the underlying condition, they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service (emphasis added).

The commenter asserted that this revision is needed to ensure the paragraph complies with Hines v. Principi, 18 Vet. App. 227, 241-42 (2004).

As a preliminary matter, we note that the Hines case does not impose any requirement that there be "clear and convincing" evidence that the usual effects of treatment provided during service do not constitute an increase in the severity of the underlying condition. Likewise, there is no such requirement in current § 3.306(b)(1), the regulation on which initially proposed § 5.245(b)(3) was based. The commenter offers no explanation of how initially proposed paragraph (b)(3) is inconsistent with Hines or § 3.306(b)(1) nor how it is unclear in any way. We therefore propose to make no change based on this comment.

§ 5.249 Special service connection rules for combat-related injury or disease.

One commenter urged VA to establish a new policy by revising initally proposed § 5.249 to create a presumption based on H.R. 6732, 110th Congress, 2nd session. The commenter suggested that VA include the following language in § 5.249: "(iii) Deployment during service to a theatre of combat operations or hostilities during a period of war."

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.250 Service connection for posttraumatic stress disorder.

One commenter expressed concern that proposed § 5.250 modifies the provision in 38 CFR 3.304(f) that states, "[i]f the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat . . . the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor." The commenter believed that proposed § 5.250 "shifts the burden to the veteran by requiring 'credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.'" Another commenter also expressed the same concerns.

Proposed § 5.250 does not increase the burden of proof on veterans claiming service connection for posttraumatic stress disorder (PTSD). The provision quoted by the commenter is merely a restatement of the language in the introductory paragraph of § 3.304(f). The special provision for combat veterans that the commenter referred to is discussed in proposed § 5.250(d). That paragraph refers the reader to the rule for combat veterans contained in § 5.249. As we stated in the NPRM preamble, because § 5.249 applies to all claims, there is no need to repeat it in § 5.250. We therefore propose to make no change based on this comment.

One commenter urged that VA revise initially proposed § 5.250 to eliminate the "credible supporting evidence" requirement for PTSD stressors which would permit a VA fact-finding hearing official to consider a veteran's sworn, personal hearing testimony -if believed by the VA hearing official -as evidence that can establish that the veteran was exposed to an adequate stressor. The commenter asserted, among other things, that this requirement, which is based on an identical, long-standing provision in 38 CFR 3.304(f), is contrary to 38 U.S.C. 5107(b), which states, "The Secretary shall consider all information and lay and medical evidence of record in a case . . ."

We respectfully note that the legal arguments raised by the commenter were addressed and rejected by the U.S. Court of Appeals for the Federal Circuit in Nat'l Org. of Veterans Advocates v. Sec'y of Veterans Affairs, 330 F. 3d 1345 (Fed. Cir. 2003). In NOVA, the court expressly held that § 3.304(f) does not permit VA to deny service connection for PTSD in non-combat veterans without considering all the information and evidence of record in cluding lay evidence. 330 F.3d at 1352. It went on to hold that § 3.304(f) was consistent with 38 U.S.C. 5107. Id. Because the court has upheld this provision, and because we continue to believe that the rationale for the requirement is valid, we propose to make no changes based on this comment.

Initially proposed § 5.250(a)(1), required that in claims for service connection for PTSD, there must be "[m]edical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter." 75 FR at 53765. See 38 CFR 4.125(a) (2010). Under § 4.125,

all mental disorder diagnoses must conform to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) ("DSM-IV'). Id. One commenter asserted that initially proposed § 5.250(e)(2)(ii) is inconsistent with the DSM-IV's first diagnostic criterion to support a diagnosis of PTSD because the proposed paragraph uses terms that the DSM-IV does not use. Specifically, the commenter noted that under the DSM-IV's first diagnostic criterion, a person who has been exposed to a psychologically traumatic event, like those events described in initially proposed § 5.250(e)(2)(i), VA omitted the term "intense" and instead stated that must have experienced a response to the traumatic event that "involved intense fear, helplessness, or horror." However, under initially proposed § 5.250(e)(2)(ii), a veteran's response to a traumatic event must "involve [ ] a psychological or psycho-physiological state of fear, helplessness, or horror." 75 FR at 53766. The commenter noted that the terms "psychological" and "psycho-physiological" do not appear in the DSM-IV.

We note that § 5.250(e)(2)(ii) was based on a provision in § 3.304(f)(3), which VA added by a separate rulemaking published July 13, 2010 (75 FR 39843) and which has been challenged in the case Paralyzed Veterans of America v. Sec'y of Veterans Affairs, 412 F. App'x 286 (Fed. Cir. 2011). We believe that it would be premature to revise proposed § 5.250(e)(1) until the U.S. Court of Appeals for the Federal Circuit has rendered a decision in the above captioned case, and we therefore propose to make no change based on these comments.

Several commenters suggested that proposed § 5.250(e)(1) be changed to allow the stressor to be confirmed by any examining or treating psychiatrist or psychologist, not just a VA psychiatrist or psychologist. We note this provision is based on a provision in § 3.304(f)(3), which VA added by a separate rulemaking published July 13, 2010 (75 FR 39843) and which has been challenged in the case Paralyzed Veterans of America v. Sec'y of Veterans Affairs, 412 F. App'x 286 (Fed. Cir. 2011). We believe that it would be premature to revise proposed § 5.250(e)(1) until the U.S. Court of Appeals for the Federal Circuit has rendered a decision in the above captioned case, and we therefore propose to make no change based on these comments.

Another commenter urged VA to revise proposed § 5.250 (f) "Special rules for establishing a stressor based on personal assault", to allow veterans diagnosed with PTSD resulting from Military Sexual Trauma (MST) six months to respond to a VA request for more information about their stressor, rather than the 30 days under current VA practice pursuant to the Veterans Claims Assistance Act (VCAA). The commenter asserted that, "Without more time veterans with PTSD secondary to MST are unlikely to comply." In support of this assertion, the commenter stated:

> Veterans with PTSD as a result of MST often feel guilt or shame. Many of these veterans have not shared with family and friends that they were sexually assaulted in the military. If a veteran receives a VCAA notice asking for additional evidence, such as statements regarding changes in behavior from friends and family, the guilt and shame that they are suffering make it unlikely that the veteran will respond to the 30 day deadline of the VCAA notice.
> Many of ICLC's clients are in mental health treatment facilities because of the impact of their PTSD secondary to MST. These clients cannot handle day to day functions. Responding within 30 days to a VCAA notice is unrealistic. This is especially true considering that the information the Regional Office requires can be difficult to obtain. Records from rape crisis centers are destroyed after a period of time and it can take as long as nine months to obtain service treatment records from the National Personnel Records Center. We have found that our clients need significant help and time to respond to the VCAA notice.

The commenter also expressed concern that proposed § 5.250(f) does not provide enough detail as to how a veteran will be "advised that evidence from sources other than the veterans service records may constitute credible supporting evidence." The commenter noted that although the purpose of VA's Regulation Rewrite Project is to make VA regulations more logical, claimant-focused, and user-friendly, simply adopting 38 CFR 3.304(f)(5) "wastes an opportunity to provide more concrete explanation of the type of notice that will be provided to a veteran with PTSD secondary to MST."

As a preliminary matter, we note that the procedures VA follows for requesting evidence from claimants is explained in proposed § 5.90 (based on current 38 CFR 3.159). These procedures apply to all claims, so it would be redundant to restate them in § 5.250. Regarding the commenter's suggestion that, for military sexual trauma claims, VA expand the time permitted to respond to VA requests for evidence, we note that the commenter is correct that the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.251 Current disabilities for which VA cannot grant service connection.

When we initially proposed § 5.251 (see 75 FR 53744, Sept. 1, 2010), we failed to state in the preamble that proposed 5.251(c) would be new. It would incorporate and

expand upon 38 CFR 4.127, which states, “Mental retardation and personality disorders are not diseases or injuries for compensation purposes, and, except as provided in § 3.310(a) of this chapter, disability resulting from them may not be service-connected. However, disability resulting from a mental disorder that is superimposed upon mental retardation or a personality disorder may be service-connected.” Proposed § 5.251(c) expands the principle to recognize that the preexistence or coexistence of disabilities for which VA cannot grant service connection does not preclude granting service connection for “superimposed” disabilities that independently meet the criteria for service connection.

B. Presumptions of Service Connection for Certain Disabilities, and Related Matters

In a document published in the Federal Register on July 27, 2004, we proposed to revise VA regulations governing presumptions of service connection for certain disabilities and related matters, to be published in new 38 CFR part 5. See 69 FR 44614. We provided a 60-day comment period that ended September 27, 2004. We received submissions from seven commenters: Disabled American Veterans, Paralyzed Veterans of America, Vietnam Veterans of America, and four members of the general public.

Undesignated Center Heading Before § 5.260

One commenter suggested that the proposed undesignated center heading before § 5.260 is inaccurate. As proposed, it read, “Presumptions of Service Connection for Certain Disabilities, and Related Matters.” The commenter suggested

that the word “disabilities” should be replaced by the word “diseases” because the presumption of service connection attaches to the disease rather than the disability and because it conflicts with subsequent regulatory language using the word “disease”.

We agree with the commenter that it is appropriate to add “diseases” to the undesignated center heading; however, we would do so by inserting the word before the word “disabilities”, rather than by replacing that word. The proposed undesignated center heading was imprecise because it was under-inclusive; however, to change the undesignated center heading by replacing “disabilities” with “diseases” would also be under-inclusive because to simply refer in our regulations to “diseases” may not adequately identify to readers all of the medical conditions identified by the authorizing statutes. See, for example, 38 U.S.C. 1112 (titled “Presumptions relating to certain diseases and disabilities”); 38 U.S.C. 1112(b)(10) and (14) (providing benefits for a “disorder” and a “syndrome”); 38 U.S.C. 1117 (authorizing compensation for “qualifying chronic disabilit[ies]”); and 38 CFR 3.309(c) (including as presumptively service connectable “diseases”, psychosis, anxiety states, dysthymic disorder, and organic residuals of frostbite, which may not be generally understood by the public as “diseases”). It is important that our regulations clearly explain the various conditions to which a presumption applies, irrespective of whether current medical authorities classify a particular condition as a “disease”, Referring to “diseases, disabilities, and related matters” in our undesignated subheading will provide the most useful information to VA personnel and the public.

Thus, we propose to revise both the undesignated center heading and the regulations herein in accordance with the above discussion. For example, in § 5.261, we refer to “chronic diseases” because that is the term the statute uses and because the list comprises conditions that are commonly understood to be diseases. The sole exception might be a “brain hemorrhage”, but we do not believe that including that condition on the long list of “chronic diseases” will create confusion. On the other hand, in § 5.267(b), we provide a “list [of] diseases or injuries that VA will consider associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite” because that list contains several items that are more commonly understood to be injuries, such as corneal opacities and scar formation.

§ 5.260 General Rules Governing presumptions of service connection

We propose to revise the heading of § 5.260 from “General rules and definitions” to “General rules governing presumptions of service connection." This title is more precise and more descriptive.

We received two comments regarding § 5.260(a), a new provision that describes the purpose of presumptions of service connection. Both commenters agreed that the description of presumptions and how they operate in § 5.260(a) is accurate. However, both commenters suggested that VA add language to § 5.260(a) to clearly define the term “presumption”.

One commenter suggested supplementing the explanation of how a presumption operates with a legal definition of the term “presumption”, in order to make clear that presumptions are a rule of law that must be followed unless the presumption is sufficiently rebutted. The commenter suggested two definitions. The first is from Manning v. John Hancock Mut. Life Ins. Co., 100 U.S. 693, 697-98 (1879), which held that the existence of a fact may be presumed from the existence of other proven facts, so long as the presumed fact has an immediate connection or relation with the proven facts. The second definition suggested by the commenter is from “Black’s Law Dictionary”, 1067 (5th ed. 1979), stating that a presumption is “a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted.”

After review, we propose not to define the term “presumption” in § 5.260(a). While both legal definitions of the term “presumption” suggested by the commenter are correct, we do not believe that regulation readers will be best served by a legal definition of the term “presumption” in § 5.260(a). Since the legal definition of a presumption is a clear concept in the law, it is not necessary to include such a definition to aid the courts in interpreting the term “presumption”. In addition, a legal definition of “presumption” in proposed § 5.260(a) would not well serve readers who may not be familiar with legal jargon in such a definition. With respect to the commenter’s suggestion that VA must clarify that a presumption is a rule of law, we note that the mere existence of presumptions in both the statutes and in these regulations makes clear that these presumptions are in fact laws. With respect to the legal effect of a

presumption, we have adequately explained the effect of the presumptions of service connection in proposed § 5.260(a).

Another commenter suggested that VA adopt the final sentence of § 3.303(d) as the first sentence of § 5.260(a), as it is a clear and succinct statement of the purpose of presumptions. The final sentence of § 3.303(d) reads: "The presumptive provisions of the statute and [VA] regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid."

We agree in part, and propose to add the following as the first sentence of § 5.260(a): "Presumptions of service connection apply when the evidence would not warrant service connection without their aid." We do not mean to include the characterization of the presumptions as liberalizations because such a characterization is not helpful. Although it is true that presumptions of service connection allow veterans who might not be able to establish direct service connection to have their disease service connected, it is misleading to refer to them as liberalizations. The effect of a liberalizing law is provided for in § 5.152, and we do not want § 5.260(a) to confuse that section with the general law governing presumptions of service connection.

In addition, we determined that in initially proposed § 5.260, we failed to include the second sentence of 38 CFR 3.303(d), which states, "Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection." We propose to restate this provision more clearly

by adding this sentence at the end of § 5.260(a), “VA will not use the existence of a presumptive period to deny service connection for a presumptive disease diagnosed after the presumptive period if direct evidence shows it was incurred or aggravated during service.”

After reviewing initially proposed § 5.260(b)(1), we propose to remove the parentheses from around the last sentence of the paragraph because they are unnecessary.

Initially proposed § 5.260(b)(2) discussed “competent lay evidence”, “lay evidence”, and “medical evidence”. In § 5.1 we have defined “competent lay evidence” and “competent expert evidence” (which includes medical evidence). Our intent in initially proposed paragraph (b)(2) was to refer to competent evidence. We therefore propose to insert the word competent before lay and medical throughout this paragraph. To ensure consistency we propose to make these same changes throughout part 5.

We propose to make a minor technical change to the language of § 5.260(c). The introductory text to § 5.260(c), as initially proposed, stated: “VA cannot grant service connection under this section when the presumption has been rebutted by the evidence of record.” 69 FR 44624, July 27, 2004. We propose to change the words “this section” in this sentence to “§§ 5.261, 5.262, 5.264 through 5.268, 5.270 and 5.271”.

In addition, we propose to change initially proposed § 5.260(c) based on comments objecting to our decision not to use the term "affirmative evidence" in the description of what kind of evidence may be used to rebut a presumption of service connection for a disease. Specifically, in § 5.260(c)(2) we stated that "[a]ny evidence competent to indicate the time a disease existed or started may rebut a presumption of service connection that would otherwise apply." 69 FR 44614, July 27, 2004. Because 38 U.S.C. 1113(a) specifically requires "affirmative evidence" to rebut the "disease presumptions" set forth in chapter 11, title 38, United States Code, we propose to revise initially proposed § 5.260(c) to require affirmative evidence. In addition, we agree with several commenters who defined affirmative evidence as evidence that declares a fact positively and establishes that a particular disease does not warrant the award of presumptive service-connection. We propose to revise paragraph (c)(2) to define "affirmative evidence" as "evidence that supports the existence of a particular fact," and to further state that affirmative evidence "does not mean the mere absence of evidence."

However, some commenters asserted that under no circumstances may VA rebut a presumption based on the absence of evidence. A commenter stated that a medical opinion founded on the absence of symptoms is not "affirmative evidence". Similarly, another commenter stated that a medical opinion used to rebut the presumption of service connection for a chronic disease may not be based on the length of time between service and clinical manifestation of the disease, because Congress chose a specific period for the presumption of service connection to apply for each

disease. The commenter noted that in 38 U.S.C. 1112(a)(2), Congress provided for a presumptive period of "one year from the date of separation from such service, or at a time when standard or accepted treatises indicate that the incubation period thereof commenced during such service." According to the commenter, because Congress did not provide this alternative for chronic diseases, pure medical judgments cannot override the presumptive period allotted by Congress.

We disagree with these comments in the following respect: To rebut a presumption that a presumptive disease was incurred during service or during the post-service presumptive period, affirmative evidence would have to show that the disease did not exist at such time. A medical opinion that establishes the date of onset of the disease determined by the use of fact-based medical evidence may serve as "affirmative evidence" regarding the onset or existence of that disease, even if the mere absence of symptoms or other evidence of disease is not. In other words, it is the medical professional's qualified opinion that serves as evidence to be considered by VA's adjudicator, not the lack of evidence in the claims file. Hence, we propose to revise § 5.260(c)(2) to state that "the absence of evidence may be a basis for affirmative evidence. For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of signs or symptoms of the condition before that time."

One commenter objected to the statement in proposed § 5.260(c) which states that once a presumption has been rebutted, VA can no longer grant presumptive

service connection. The commenter believes the statement is not true in all cases, and suggests that if the veteran provides medical or lay evidence, it would be possible for the veteran to establish service connection on a presumptive basis. As an example, the commenter proposes a situation where VA reviews available medical records and finds the evidence rebuts the presumption of service connection because the veteran has not received a credible diagnosis of the disease for which he or she is claiming presumptive service connection. The commenter proposes that if the veteran later obtains a credible medical opinion diagnosing the veteran with the presumptive disease, the veteran should be entitled to presumptive service connection.

We propose not to make any changes based on this comment. In the hypothetical situation posed by the commenter, the absence of a credible diagnosis of the claimed disease does not serve to rebut the presumption of service connection. In that situation, the presumption never arose because the existence of the claimed condition is one of the underlying facts necessary to give rise to the presumption. If the veteran subsequently presents evidence sufficient to prove that he or she did in fact suffer from a disease for which VA may grant presumptive service connection, then the presumption will apply.

In any event, no scenario allows VA to grant presumptive service connection after the evidence rebuts the presumption. The commenter is correct that if VA rebuts the presumption of service connection for a disease, the veteran is entitled to bring forth evidence supporting service connection. However, service connection established in

this manner is granted under 38 U.S.C. 1110 (generally referred to as “direct” service connection) and is not presumptive service connection. If the presumption of service connection is rebutted, a veteran may still establish service connection by filing evidence showing the onset of the disease in service, or by any other method provided by these regulations.

In NPRM AM07, we changed “symptomatology” to “signs or symptoms” consistent with current medical terminology. For consistency, we propose to do the same in § 5.260 and throughout part 5. In paragraph (b)(1), we propose to change “symptomatology” to “signs or symptoms”. In (b)(2), we propose to replace the phrase “physical findings and symptomatology” with “signs or symptoms”. The term “signs” is equivalent to “physical findings”. Moreover, we intend this rule to include mental as well as physical signs.

In initially proposed paragraph (c)(2), we stated, “For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of symptoms of the condition.” We now propose to insert “signs or” before “symptoms”. We also propose to insert “before that time” at the end of the sentence to clarify when an absence of signs or symptoms is relevant.

In initially proposed § 5.260(a) and (c) we omitted reference to § 5.263, “Presumption of Service Connection for Non-Hodgkin’s Lymphoma Based on Service in Vietnam”. In reviewing the presumption regulations to respond to comments, we have

noted that there is no reason to exclude § 5.263 from these provisions. We recognize that 38 CFR 3.313 contains no rebuttal provision but we do not believe that an irrebuttable presumption would be consistent with title 38 to the extent it would authorize benefits for a disease shown by clear evidence to be unrelated to service or to be attributable to the veteran's willful misconduct. We therefore propose to include § 5.263 in paragraphs (a) and (c).

§ 5.261 Certain Chronic Diseases VA Presumes are Service Connected

In reviewing the initially proposed regulation, we noted that we included the phrase, "from a qualifying period of service", in § 5.261(a)(1), but not in § 5.261(a)(2). To ensure that readers are aware that the presumptions apply only after a period of qualifying service, we propose to revise § 5.261(a)(2) to include the phrase, "after a qualifying period of service". In § 5.261(a)(1), we propose to change the term, "a year" to "1 year" to ensure consistency throughout our regulations.

In initially proposed § 5.261(c), based on current §§3.307(a)(2) and 3.308(a), we stated, "In claims based on service ending before December 7, 1941, for purpose of determining whether a chronic disease manifested within a presumptive period under 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." We have determined that this paragraph is erroneous because veterans whose service ended before that date get no presumption of service connection for chronic disease. Therefore, there can be no "date of separation from wartime service" for a pre-

December 7, 1941 veteran “for the purpose of determining whether a chronic disease manifested within a presumptive period.” We therefore propose to remove paragraph (c) and redesignate the remaining paragraphs of § 5.261 accordingly.

One commenter suggested that VA include a statement clarifying that the chronic diseases listed in initially proposed § 5.261(d) (now (c)) are the only conditions that will be considered chronic. Currently, § 3.307(a) states that no condition other than one listed in § 3.309(a) will be considered chronic. In addition, 38 U.S.C. 1101(3) contains a list of chronic diseases and includes “such other chronic diseases as the Secretary may add to this list”, which strongly implies that the list should be considered exclusive absent action by the Secretary. The commenter believes that stating that the list of chronic diseases in § 5.261(d) is exclusive will prevent any misconception that VA has the ability to establish presumptive service connection for any disease which appears no later than 1 year after leaving service. The commenter concluded that nothing prevents VA from stating the list of chronic conditions in § 5.261(d) is exclusive.

We agree and propose to include the sentence, “Only conditions listed in this section are chronic for purposes of this section.” The commenter is correct that only the conditions listed in § 5.261(d) will be considered chronic for purposes of presumptive service connection under § 5.261.

One commenter suggested that for clarity, § 5.261(d) should use the words “acute and transitory” instead of simply using “acute”. The commenter states that the

"acute and transitory" language is "consistent with long-standing VA parlance regarding how it adjudicates claims based on chronic conditions." Although VA has previously used the term "acute and transitory" in decisions, it is not consistent with current VA terminology used in adjudicating claims based on chronic conditions. The word "transitory" is not found in any regulation in either part 3 or part 4 of title 38 CFR. Nor is it found in "Dorland's Illustrated Med. Dictionary" (31st ed. 2007). Moreover, "acute" and "transitory" both suggest brief duration, so that "transitory" does not add to the meaning of the rule. For these reasons, we propose to make no changes based on this comment.

Initially proposed § 5.261(d) is based on § 3.307(b) and contains an exclusive list of the diseases VA considers chronic for purpose of presumptive service connection. One commenter stated that this section would "authorize adjudicators to determine that a chronic disease which has manifested to a compensable degree and which is under consideration for service connection is not chronic." The commenter stated that VA has no lawful authority to make an independent factual determination contrary to the command of 38 U.S.C. 1101(3), which lists chronic diseases for purposes of disability compensation.

However, 38 U.S.C. 1101(3) only defines what are considered to be chronic diseases; it does not contain any requirement that service connection be granted for the listed diseases. The requirement to grant presumptive service connection for chronic diseases is found in 38 U.S.C. 1112(a), which states that a chronic disease will be

considered to have been incurred in or aggravated by such service. The authority to rebut a presumption of service connection is found at 38 U.S.C. 1113(a), which states that "where there is affirmative evidence to the contrary, or evidence to establish that intercurrent injury or disease . . . has been suffered . . . service-connection . . . will not be in order." The wording in initially proposed § 5.261(c) is a restatement of the previous wording used in § 3.307(b), which states, "Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease." As initially proposed, § 5.261(d) restated this principle as, "Unless the clinical picture clearly shows the condition was only acute, VA will consider whether an acute condition was an exacerbation of a chronic disease." Based on the comment, we understand that the proposed rule could be misunderstood to authorize VA to treat a chronic condition as if it were acute. Neither the statute nor the current regulation authorize such treatment, and we did not propose to create such authorization in § 5.261(d). Hence, we propose to revise the sentence so that it more closely follows the language of the current regulation.

We received four comments stating that our proposed rule regarding the presumption of service connection for aggravation of certain chronic diseases and diseases associated with exposure to certain herbicide agents in proposed §§ 5.261(d) and 5.262(e) is contrary to the holding of the U.S. Court of Appeals for the Federal Circuit in Splane v. West, 216 F.3d 1058 (Fed. Cir. 2000), and otherwise not in accordance with 38 U.S.C. 1112(a) and 1116(a). The comments asserted that the statutes do not limit the degree to which a pre-existing condition must be disabling prior

to entry in order for the presumption of aggravation to apply; that the statute does not provide that a disease must "first" become manifest during the presumptive period; and that 38 U.S.C. 1112(a) and 1116(a) should be interpreted to provide a presumption of aggravation of the listed diseases if the degree of disability increases by any degree during the applicable presumptive period (for example, from 20 percent disabling to 30 percent disabling).

Additionally, a commenter suggested that the treatment of preexisting conditions under 38 U.S.C. 1112(a) and 1116(a) conflicts with the treatment of preexisting conditions under 38 U.S.C. 1153, the general presumption of aggravation. Commenters asserted that VA could not arbitrarily apply different rules to veterans who had preexisting disabilities that were aggravated by service than to veterans who had no preexisting disabilities. One commenter suggested that the only difference is the "formality" that the underlying pathology had its inception prior to service rather than during service.

By way of background, 38 U.S.C. 1153 provides a presumption that "[a] preexisting injury or disease will be considered to have been aggravated by active military . . . service, where there is an increase in disability during such service." The presumptions at issue in proposed §§ 5.261 and 5.262, however, are based on 38 U.S.C. 1112(a) and 1116(a), which provide a presumption for conditions that manifest to a degree of disability of 10 percent or more during a specified period of time after service.

In the Splane case, the Federal Circuit examined whether the post-service presumptive period in 38 U.S.C. 1112(a) could cover a preexisting condition. The Federal Circuit held that the words "or aggravated by" in paragraph (a) required application of the presumption of aggravation of a chronic disease to a veteran whose chronic disease existed but was not compensable prior to service, regardless of VA's "not altogether unpersuasive" argument that those words were a vestige of an earlier provision that was long ago rendered obsolete. Splane, 216 F.3d at 1069. The court found it "unreasonable to assume that Congress did not anticipate the possibility that a veteran, who had nonsymptomatic M[ultiple] S[clerosis] before service, might be exposed to such aggravating conditions during service that he would become disabled to a compensable degree after service." Id..

Our proposed part 5 regulations specifically accounted for this possibility by presuming that a chronic disease or a disease associated with herbicide exposure is presumed to have been aggravated during service if the disease manifests to a compensable degree within the applicable presumptive period. Proposed § 5.261(d) stated that VA cannot presume service connection when the evidence shows that the disease existed prior to military service to a degree of 10 percent or more disabling. Section 5.262(e) used nearly identical language. We explained our rationale in the NPRM, as follows:

> The Federal Circuit held that the words "or aggravated by" indicate that Congress meant section 1112(a) to apply to those situations where multiple sclerosis predated entry into the service and became disabling to a compensable degree within the presumptive period following service.

> The "or aggravated by" language also appears in 38 U.S.C. 1116(a)(1)(B), which provides the authority for the presumptions based on herbicide exposure. Therefore, we propose to add language to clarify that presumptions may apply to a listed disease that preexisted service but first became manifest to a degree of 10 percent or more within the presumptive period following service.

69 FR 44620, July 27, 2004.

Limiting §§ 5.261 and 5.262 presumptions to situations where the condition was not manifest to a degree of 10 percent or more disabling before service is not arbitrary, unfair, or beyond VA's statutory authority. Under 38 U.S.C. 1112(a)(1), VA must presume service connected "a chronic disease becoming manifest to a degree of 10 percent or more disabling within one year from the date of separation from . . . service," and 38 U.S.C. 1116(a) similarly creates a presumption based on manifestation of a disease to a degree of 10 percent or more disabling within the presumptive period. Use of a 10 percent threshold would not make sense if a preexisting disease manifest to a degree of 10 percent or more disabling prior to service could trigger the presumption because the disease would already have reached the threshold before service. If Congress had intended to also presume aggravation for a veteran who already had a disease manifest to a compensable degree prior to service, the law could have been written to presume service connection for a disease that "worsens by 10 percent or more," rather than one that "becom[es] manifest" to such a degree. Finally, we note that most of the diseases that are considered chronic are diseases that, had they been symptomatic prior to service, would have likely rendered the person ineligible for service. In fact, several of the conditions are so disabling that their symptoms cannot

even be rated as merely 10 percent disabling. For example, the first signs of multiple sclerosis are rated at 30 percent under 38 CFR 4.124a, Diagnostic Code 8018. It is unlikely that VA will receive claims from persons who were compensably disabled before service, and our experience has not shown this to be a problem under the current regulations.

Lastly, we note that the Splane court did not address the type of case described by the commenters: where a disability was already manifest to a degree of disability of 10 percent or more prior to service. The commenters urge VA to adopt an interpretation of 38 U.S.C. 1112 far beyond that which the Splane court provided. For the reasons stated above, we propose to make no changes based on these comments.

One commenter also had a comment related to the following sentence in the NPRM:

> We note that if the condition preexisted service to a degree of 10 percent, for example, and after service the condition was 20 percent disabling, the veteran may be able to establish service connection using the presumption of aggravation in 38 U.S.C. 1153.

69 FR 44620, July 27, 2004.

The commenter noted that 38 U.S.C. 1153 only applies to increases in disability during service. Therefore, this statement would not be correct with respect to increases in disability within the presumptive period. The commenter is correct that 38 U.S.C. 1153

only applies to aggravation during service. We clarify this statement by noting that when we said “after service”, we meant immediately after service.

The commenter stated that in some cases, VA would presume that a disease in a state of remission or inactivity was disabling to a degree of 10 percent at entry, while a draft rule for service connection indicates that VA would deny service connection for lack of current disability if a disease was in remission. The commenter objects to this dual standard for cases when diseases are in remission.

We propose to make no changes based on this comment. The provision the commenter discussed from the draft rule for service connection does not address this situation since that concerns direct service connection and not establishment of service connection through the use of the presumptions. Additionally, if there is no current disability, service connection cannot be established. Also, Congress in 38 U.S.C. 1112, mandated that the disease must manifest to a degree of 10 percent or more disabling before VA may presume service connection. A disease that is in remission and is not manifest to a degree of 10 percent or more disabling may not be service connected under the presumptions of service connection provisions.

§ 5.262 Presumption of Service Connection for Diseases Associated with Exposure to Certain Herbicide Agents

In our initially proposed regulations on presumptions of service connection, we changed the wording found in §§ 3.307(a) and 3.317(c)(3), “. . .[certain diseases] will be

considered to have been incurred in or aggravated by service. . .” to “VA will presume service connection [for certain diseases]. . .” We proposed this language in several part 5 regulations: §§ 5.262(a)(2), 5.264(b) and (c), 5.265(a) and (d), 5.267(a), and 5.268(b). This attempt to use simpler language resulted in a technical error because under its authorizing statutes, VA service connects disability or death, not injury or disease *per se*. We therefore propose to correct these sections to reflect that the diseases listed will be considered to have been incurred in or aggravated by service.

We received four comments regarding the proposed definition of “Service in the Republic of Vietnam” in § 5.262(a)(1) for purposes of the presumption of service connection for diseases associated with exposure to certain herbicide agents. As proposed, § 5.262(a)(1) stated:

> For purposes of this section, “Service in the Republic of Vietnam” does not include active military service in the waters offshore and service in other locations, but does include any such service in which the veteran had duty in or visited in the Republic of Vietnam, which includes service on the inland waterways.

69 FR 44626, July 27, 2004.

Three commenters objected to the exclusion of service in the waters offshore Vietnam in the definition of “Service in the Republic of Vietnam” for purposes of § 5.262. One commenter stated that when Congress refers to a country by its name in a statute, it is referring to the entire country, including the entire area over which a country has sovereignty. This would, under the 1982 United Nations Convention on the Law of the Sea, 21 I.L.M. 1261, include the territorial sea which extends up to twelve miles beyond

the land territory of Vietnam. All three commenters support this proposition with an example of the service required to receive the Vietnam Service Medal. Executive Order 11231, July 8, 1965, provides that the "Vietnam Service Medal shall be awarded to members of the armed forces who serve in Vietnam or contiguous waters or air space". The commenters believe that the definition of "Service in the Republic of Vietnam" provided in § 5.262(a)(1) is contrary to the ordinary and common meaning of the phrase. Therefore, the commenters believe there is no reason to believe that Congress intended to exclude the territorial sea when it drafted 38 U.S.C. 1116.

We propose to make no changes based on these comments. These comments are adequately addressed by Haas v. Peake, 425 F.3d 1168 (Fed. Cir. 2008); the notice proposing to rescind, and the notice actually rescinding, the VA manual provision cited in Haas, 72 FR 66218, Nov. 27, 2007 and 73 FR 20363-65, Apr. 15, 2008; and the proposed revision to 38 CFR 3.307(a)(6)(iii), 73 FR 20566-71, Apr. 16, 2008 (withdrawn by 74 FR 48689, Sept. 24, 2009). We incorporate by reference the rationales set forth therein, and do not reiterate them here.

However, we do propose to revise initially proposed § 5.262(a)(1) so that it more clearly conveys the requirement that the veteran have served "on land, or on an inland waterway, in the Republic of Vietnam."

On May 7, 2009, VA published Final Rule RIN 2900-AN01, "Presumptive Service Connection for Disease Associated With Exposure to Certain Herbicide Agents: AL

Amyloidosis", which stated the Secretary's determination of "a positive association between exposure to herbicide agents and the occurrence of AL amyloidosis" and added that disease to 38 CFR 3.309(e). 74 FR 21258. Therefore, we now propose to include AL amyloidosis in § 5.262(e) in accordance with the Secretary's finding.

On August 31, 2010, VA published RIN 2900-AN54, "Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease and Ischemic Heart Disease)" which stated the Secretary's determination of "a positive association between exposure to herbicide agents and the occurrence of those diseases" and added those diseases to 38 CFR 3.309(e). 75 FR 53202. Therefore, we now propose to include them in § 5.262(e) in accordance with the Secretary's finding.

We propose to change the term "acute and subacute peripheral neuropathy" in § 5.262 and instead use the term "early-onset peripheral neuropathy". Additionally, we have removed note \1\ which provided that peripheral neuropathy must resolve within 2 years of onset. This conforms to changes made in part 3. 78 FR 54763, Sept. 6, 2013.

§ 5.263 Presumption of Service Connection for Non-Hodgkin's Lymphoma Based on Service in Vietnam

One commenter believed that proposed § 5.263, which was based on § 3.313 with minor changes, was unnecessary. Proposed § 5.263 provides for presumptive service connection for non-Hodgkin's lymphoma based on service in Vietnam. The

commenter asserted that anyone eligible for presumptive service connection under § 5.263 would also be eligible for presumptive service connection under § 5.262 and it is therefore unnecessary to have § 5.263.

We propose to make no changes based on this comment. We agree with the commenter that many of the veterans entitled to presumptive service connection under § 5.263 may also be entitled to presumptive service connection under § 5.262. However, there are differences between §§ 5.262 and 5.263 that require two separate rules. Therefore, we propose to retain § 5.263 in our final rule. One difference is in the definition of what constitutes "service in Vietnam". See VA General Counsel's Opinion, VAOPGCPREC 27-97, 62 FR 63604 (Dec. 1, 1997). Specifically, the definition of "service in Vietnam" in § 5.263 includes service in the waters offshore Vietnam, whereas the definition in § 5.262 specifically excludes such service from the definition of "service in the Republic of Vietnam". Another difference is that § 5.262 provides for determining presumptive exposure to herbicides due to service in the Republic of Vietnam while § 5.263 provides for service connection for non-Hodgkin's lymphoma without regard to possible exposure to herbicides in the Republic of Vietnam.

§ 5.264 Diseases VA Presumes are Service Connected in a Former Prisoner of War

On June 30, 2006, VA published in the Federal Register an addition to § 5.264, "Diseases VA presumes are service connected in former prisoners of war", adding atherosclerotic heart disease or hypertensive vascular disease (including hypertensive heart disease) and their complications (including myocardial infarction, congestive heart

failure, and arrhythmia) and stroke and its complications to the diseases VA presumes are service connected in former prisoners of war. 71 FR 37793, June 30, 2006. No comments were received concerning this addition. Proposed § 5.264 is revised from the version published in the NPRM, by adding these conditions to the list of diseases. 69 FR 44614, July 27, 2004.

Section 106 of Public Law 110-389, 122 Stat. 4145, 4149 (2008), amended 38 U.S.C. 1112(b)(2) by adding a new subparagraph (F) that creates a presumption of service connection for osteoporosis that becomes manifest to a degree of 10 percent for prisoners of war (POWs) if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD). On August 28, 2009, VA published an amendment in the Federal Register to § 3.309(c), applying Public Law 110-389. 74 FR 44288. This amendment also implements a decision by the Secretary to establish a presumption of service connection for osteoporosis that becomes manifest to a degree of 10 percent for POWs if the veteran was interned for more than 30 days. This presumption is based on scientific studies. These changes have been incorporated into proposed § 5.264(b) and (c).

§ 5.265 Tropical Diseases VA Presumes are Service Connected

In initially proposed § 5.265(d), we stated, "For any disease service connected under this section, VA will also service connect the resultant disorders or diseases originating because of therapy administered in connection with such a disease or as a preventative measure against such a disease." We have determined that this sentence

is redundant of the basic rule on secondary service connection contained in § 5.246, "Secondary service connection—disabilities that are due to or the result of service-connected injury or disease." Therefore, we propose to remove this sentence from § 5.265(d).

One commenter suggested a minor clarifying change to § 5.265(e). The commenter suggested revising the sentence stating that "Residence during the applicable presumptive period where the particular disease is endemic may also be considered evidence to rebut the presumption", to refer to "post-service" residence. The commenter recognized that this addition would be redundant (because the presumptive period is post-service), but opined that it would nevertheless make the rule clearer for the average lay person. We agree that, while redundant, this minor change could be beneficial to readers. Therefore, we propose to change § 5.265(e) to refer to "[p]ost-service residence".

One commenter objected to the requirement in § 5.265(f) that would require a tropical disease to manifest to a degree of 10 percent or more disabling within the presumptive period in order for the disease to be presumptively service connected. The commenter noted that the statutory authorization for this presumption, 38 U.S.C. 1133, provides no minimum degree of manifestation for the presumption of service connection to apply for veterans with peacetime service before January 1, 1947. The commenter is correct. We propose to revise § 5.265(f) so that it no longer contains the 10 percent requirement.

Moreover, we discovered that we mistakenly used the term “existed”, rather than “manifested”, in initially proposed § 5.265(f). This language was taken from 38 CFR 3.308(b), but it does not appear in any other presumption regulation in part 5. Therefore, in order to ensure consistency with the other presumption regulations in part 5, we propose to replace “existed” with “manifested”.

We also propose to change the term “accepted medical treatises” to “accepted medical literature” throughout this section because “treatise” is a specific type of scholarly literature, specifically “a systematic exposition or argument in writing including methodical discussion of the facts and principles involved and conclusions reached.” “Merriam-Webster’s Collegiate Dictionary” 1258 (10th ed. 1998). “Accepted medical literature” is a broader class of literature, sufficiently authoritative and more accessible to claimants than are “treatises”. We propose to make the same change in § 5.266, Disability compensation for certain qualifying chronic disabilities.

§ 5.266 Disability Compensation for Certain Qualifying Chronic Disabilities

We propose to reorganize and make technical corrections to initially proposed § 5.266. We would reorganize this section as follows. Initially proposed paragraph (a) stated that VA will compensate veterans for a qualifying chronic disability and defined that term. Initially proposed paragraphs (b) and (c) defined undiagnosed illness and medically unexplained chronic multisymptom illness, respectively. Paragraph (f) would contain the general definitions that apply to all types of qualifying chronic disabilities.

We propose to move initially proposed paragraph (a)(1)(ii), which stated, “By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.” This paragraph would apply only to undiagnosed illnesses, not to other qualifying chronic disabilities, so we propose to move it into new paragraph (b), which would describe undiagnosed illnesses.

For purposes of accuracy, we propose to change the title of the regulation from “Compensation for certain disabilities due to undiagnosed illnesses” to “Disability compensation for certain qualifying chronic disabilities”.

Since publication of the AL70 NPRM, VA published a Final Rule VA that made technical revisions to 38 CFR 3.317 to clarify that adjudicators have the authority to determine whether diseases in addition to the three listed in 38 U.S.C. 1117 qualify as medically unexplained chronic multisymptom illnesses in addition to the three that are listed in 38 U.S.C. 1117. 75 FR 61995, Oct. 7, 2010. VA subsequently published a final rule that replaced “irritable bowel syndrome” with “functional gastrointestinal disorders”. 76 FR 41696, Jul. 15, 2011. We propose to incorporate these regulatory amendments into § 5.266.

Current 38 CFR 3.317(c) describes situations in which the presumptions in that section will be considered rebutted. We note that § 3.307(d) (the basis for initially proposed § 5.260(c)) already contains this same rebuttal information as it applies to the

various presumptions listed in § 3.309, but not to § 3.317. We now propose to expand the scope of § 5.260(c) to include § 5.266 and 5.271. To avoid duplication, we propose to exclude the duplicate provisions from § 5.266 and 5.271.

§ 5.267 Presumption of service connection for Conditions Associated with Full-Body Exposure to Nitrogen Mustard, Sulfur Mustard, or Lewisite

One commenter asserted that the proposed rule would have changed the current rule, § 3.316, which the commenter said requires direct service connection for exposure to mustard gas and Lewisite, to a rule that would establish presumptive service connection based on such exposure. The commenter questioned whether VA has the authority to create a new class of presumptive conditions. The commenter stated that the wording of proposed § 5.267(a) should be amended to provide for direct service connection, rather than presumptive service connection.

The commenter is incorrect that VA grants direct service connection under § 3.316. Although the regulation text does not explicitly state so, § 3.316 grants presumptive service connection and not direct service connection. The regulation presumes a medical nexus between full-body exposure to mustard gas or Lewisite and the listed diseases, thereby establishing a presumption as described in § 5.260(a).

We also note that our authority to create presumptions is explicitly set forth in 38 U.S.C. 501(a)(1), under which the Secretary may prescribe “regulations with respect to the nature and extent of proof and evidence . . . in order to establish the right to

benefits". As we noted in the preamble to the NPRM, the Secretary exercised this authority when he first promulgated § 3.316. 69 FR 44614, July 27, 2004.

We propose to revise the sentence preceding the table in § 5.267(b) so it is a complete sentence instead of a phrase and so it is consistent with other table introductions used in this regulation. We also propose to change "condition" in paragraph (a)(2) to "injury or disease" to be consistent with paragraph (b). In the table, we propose to change "disease or disability" to "injury or disease" for the same reason.

§ 5.268 Presumption of Service Connection for Diseases Associated with Exposure to Ionizing Radiation

In initially proposed § 5.268 we inadvertently failed to include the provisions of current 38 CFR 3.309(d)(3)(ii)(E). We propose to correct this omission by inserting § 5.268(c)(6), which is virtually identical to current § 3.309(d)(3)(ii)(E).

§ 5.269 Direct Service Connection for Diseases Associated with Exposure to Ionizing Radiation

In reviewing the comment received regarding this section, we have determined that both 38 CFR 3.311 and initially proposed § 5.269 use several different terms interchangeably or inconsistently. For example they refer to dose estimates as "dose assessments," "dose information," and "dose data". We propose to remedy this problem by using the phrase "dose assessment" throughout § 5.269.

In initially proposed § 5.269(c)(3), we stated, “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.” Current § 3.311(a)(4) actually limits the scope of this provision to only “cases described in paragraph (a)(2)(i) and (ii) of this section” (those involving atmospheric nuclear weapons test participation and Hiroshima and Nagasaki occupation). We inadvertently omitted this scope limitation in the initially proposed rule and we not propose to insert it in § 5.269(c)(3).

In initially proposed § 5.269(b), we omitted, without explanation, a number of cancers listed in current 38 CFR 3.311(b)(2): thyroid cancer; breast cancer; lung cancer; liver cancer; skin cancer; esophageal cancer; stomach cancer; colon cancer; pancreatic cancer; kidney cancer; urinary bladder cancer; salivary gland cancer; multiple myeloma; ovarian cancer; cancer of the rectum; and prostate cancer. We omitted these because they are subsumed within the meaning of the phrase, “Cancer (any other not listed)” in initially proposed paragraph (b)(2) (based on the phrase, “Any other cancer” in current § 3.311(b)(2)(xxiv)). We provide this explanation now, to assure the public that the fact that these cancers are not specifically referenced in the part 5 rule does not represent VA’s intent to alter the applicability of the presumption that the diseases in some cases were caused by exposure to ionizing radiation.

In initially proposed paragraph (c)(5)(iii) (now redesignated as (d)(2)(iii)) we referred to an estimated dose of "zero rem gamma". The word "gamma" is not in § 3.311 and we propose to remove it because it would improperly narrow the scope of this paragraph.

In initially proposed paragraph (d)(1) (now redesignated as paragraph (c)(1)(iii)), we stated, "If neither the Department of Defense nor any other source provides VA with records adequate to permit the Under Secretary to prepare a dose estimate, then VA will ask the Department of Defense to provide a dose estimate." We stated in the preamble that this provision would reflect the fact that it is impossible to estimate the likelihood that ionizing radiation exposure caused a claimed condition in the absence of a numerical ionizing radiation dose estimate and that VA would be unable to prepare a dose estimate if it has not received any records on which to base such an estimate.

Upon review of this provision, we have determined that it does not accurately reflect VA's procedures in such cases. Moreover, it would be impracticable to request dose assessments from the Department of Defense (DoD) in these cases. This is because if DoD lacked records adequate to permit the Under Secretary for Health to prepare a dose assessment, then presumably DoD would likewise be unable to do so. For this reason, we propose to remove this provision.

In initially proposed paragraph (f), now redesignated as paragraph (g), we stated, "With regard to any issue material to consideration of a claim, the provisions of § 3.102

of this title apply (any reasonable doubt on any issue will be resolved in favor of the claimant)." In proposed § 5.3, we state, "When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor." Since this provision applies to all VA claims, there is no need to repeat it in this paragraph and so we propose to remove it.

We received one comment stating that part of initially proposed § 5.269(g), now redesignated as paragraph (h), is unnecessary. The commenter believes that there is no danger of service connection being established for a disease due to radiation exposure if the disease is due to the abuse of alcohol or drugs. The commenter believes that since § 5.269 requires competent evidence and a decision by the Under Secretary of Benefits that it is at least as likely as not that the veteran's disease resulted from ionizing radiation in service, a disease due to the abuse of alcohol or drugs could not possibly be service connected under § 5.269.

We agree that the language regarding abuse of alcohol or drugs is unnecessary in § 5.269(h) and propose to remove it. Section 5.662, "Alcohol and drug abuse", already bars an award of service connection for disabilities resulting from such abuse. For the same reason, we propose to remove such language from § 5.266(c)(3).

In initially proposed § 5.269(g), now redesignated as paragraph (h), we referred to "a supervening, nonservice-related condition or event [that] is more likely the cause of the disease" but failed to say more likely than what. We propose to clarify this by

adding “than was exposure to ionizing radiation in service” so that the sentence will read: “In no case will service connection be established if evidence establishes that a supervening condition or event unrelated to service is more likely the cause of the disease than was exposure to ionizing radiation in service.”

In addition to the changes described above, we also propose to make minor changes in format and wording for clarity and readability.

§ 5.270 Presumption of service connection for Amyotrophic Lateral Sclerosis

Since publication of the AL70 NPRM, VA published a Final Rule creating a presumption of service connection for amyotrophic lateral sclerosis, which was codified as 38 CFR 3.318. 73 FR 54693, Sept. 23, 2008. We propose to add the text of § 3.318 as new § 5.270, with one revision: rather than restate the rebuttal standards already contained in § 5.260(c), we simply referenced that paragraph.

§ 5.271 Presumption of service connection for Infectious Diseases

Since publication of the AL70 NPRM, VA published a final rule creating presumptions of service connection for nine infectious diseases, which was codified as 38 CFR 3.317. 75 FR 59968, Sept. 29, 2010. Infectious diseases are not actually within the definition of “qualifying chronic disability,” which is the purported subject of the regulation. Removing those provisions to a separate section will make the rules easier to comprehend and follow. We propose to incorporate these regulatory amendments into § 5.271.

Omission of § 3.379, Anterior Poliomyelitis, from Part 5

We received two comments relating to the initial proposal in the NPRM not to repeat § 3.379 in part 5. This section concerned service connection of the disease anterior poliomyelitis. One commenter agreed with the proposal. Another commenter disagreed with both the proposal and VA's rationale for removing it.

We proposed not to include § 3.379 because it is unnecessary in light of the operation of proposed § 5.261 regarding the presumption of service connection for chronic diseases. 69 FR 44623, July 27, 2004. Congress specified myelitis as a chronic disease under 38 U.S.C. 1101(3), and anterior poliomyelitis is a subcategory of myelitis. The general rules of presumptive service connection for chronic diseases under § 5.261 would apply to anterior poliomyelitis and any veteran who would be service connected under § 3.379 would also be service connected under § 5.261. Therefore, we concluded that § 3.379 was unnecessary and we proposed not to include it in part 5. We propose to make no changes based on these comments.

One commenter stated that it is not proper to apply the general presumption of service connection to poliomyelitis without taking into account the known medical facts, specifically, that poliomyelitis is a disease for which the exact cause and date of onset can be ascertained.

The commenter also detailed the three possible outcomes of a poliomyelitis infection. First, there is nonparalytic poliomyelitis, which is an acute illness, which resolves with no chronic or permanently disabling residuals. Nonparalytic poliomyelitis may properly be denied service connection on that basis. Second, there is paralytic poliomyelitis. The commenter notes that the date of the antecedent illness for paralytic poliomyelitis is crucial. If it occurs no later than 35 days after separation from service, it must have occurred in service, but if it occurs more than 35 days after separation from service, it must have occurred after service (therefore rebutting the presumption of service connection). Finally, there is paralytic poliomyelitis without apparent antecedent illness. In this case, it is a matter for medical determination and opinion as to the most probable date of exposure. If the medical evidence is inconclusive, then the presumption of service connection for myelitis should apply.

We propose to make no changes based on this comment. The general rule for presumption of service connection for chronic diseases in § 5.261 would provide accurate results for all the situations the commenter described, including rebuttal by medical evidence of the type the commenter described.

First, regarding nonparalytic poliomyelitis, because this disease cannot possibly be 10 percent or more disabling, the presumption of service connection under § 5.261 cannot apply in these cases.

Second, regarding paralytic poliomyelitis, direct service connection may be established in the majority of cases based on medical knowledge that the illness occurs no later than 35 days after exposure. Where direct service connection is denied based on the fact that the illness occurred more than 35 days after separation from service, the presumption of § 5.261 will be considered. However, the presumption of service connection will be rebutted under the provisions of § 5.260(c)(1)(iii) because there will be a preponderance of evidence (based on fact-based medical evidence and the date symptoms first occurred) establishing that the disease was not incurred in service.

Finally, with respect to paralytic poliomyelitis without apparent antecedent illness as described by the commenter, where direct service connection is not in order, VA will consider the presumption of service connection for myelitis as a chronic disease. However, the Centers for Disease Control and Prevention reports that all forms of poliomyelitis have an incubation period of 3 to 35 days, so a fact-based medical opinion would be needed to establish the approximate date of onset. Poliomyelitis, Centers for Disease Control and Prevention 232, Poliomyelitis, http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/polio.pdf, last viewed Sept. 15, 2009.

Technical corrections

One commenter noted that in one part of the NPRM preamble, we "reserved" § 5.263, but elsewhere in the NPRM we proposed to repeat § 3.313 as § 5.263. The

commenter felt that this was confusing. This was an error that we now propose to correct. We propose to create a new § 5.263 that has the same wording as § 3.313, except for the changes discussed in the preamble of the NPRM. We have corrected this in this proposed rule.

C. Rating Service-Connected Disabilities

§ 5.280 General rating principles.

Initially proposed § 5.280(b)(1), based on 38 CFR 3.321, stated that for extra-schedular ratings in unusual cases that to accord justice to the exceptional case where the Veterans Service Center (VSC) finds the schedular ratings to be inadequate, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, upon VSC submission, is authorized to approve an extraschedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities. Paragrapn (b)(1) also stated that the governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the case presents an exceptional or unusual disability picture with such related factors as marked interference with employment, or frequent periods of hospitalization.

One commenter suggested that to avoid injustice in a case where the VSC improperly fails to find that the schedular rating is inadequate, VA should revise § 5.280(b)(1) to read:

> To accord justice to the exceptional case, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, is authorized to approve on the basis of the criteria set forth in this paragraph, an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities.

The commenter asserted that this suggested language is consistent with Colayong v. West, 12 Vet. App. 524, 536-37 (1999) and Young v. Shinseki, 22 Vet. App. 461, 470 (2009), which state that whether or not the VSC has, in the first instance, found the schedular rating to be inadequate, if it is inadequate it must be referred for an extra-schedular rating.

We note that the language of initially proposed 5.280(b)(1) was not substantively different from current § 3.321(b)(1), the regulation which was the basis for the courts' rulings in Colayong and Young. Those cases left undisturbed the requirement in § 3.321(b)(1) that extra-schedular review may be undertaken by the Under Secretary for Benefits or the Director, Compensation and Pension Service, only "upon field station submission". Rather, those cases held that the Board of Veterans' Appeals (Board) must adjudicate the issue of entitlement to an extraschedular evaluation, if the issue is raised by the evidence of record or by the appellant.

We do not believe it is necessary to incorporate this line of cases into part 5. Since the Colayong case was decided in 1999, the Board has been under the duty set out by the court and the Board's Veterans Law Judges are now well aware of this duty. Moreover, it would be outside the scope of part 5 to impose a duty on the Board via a part 5 regulation. We therefore propose to make no change based on this comment.

In reviewing proposed § 5.280 to respond to this comment, we have noted that it contains language (substantively the same as § 3.321(b)) that might confuse a reader. Specifically, proposed § 5.280(b)(1) stated, "To accord justice to the exceptional case where the [VA] finds the schedular ratings to be inadequate, the [VA] is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities." The use of the plural "disabilities" might be misconstrued as allowing VA to approve an extra-schedular rating based partly on a disability for which the schedular rating is inadequate and partly on a disability for which the schedular rating is adequate, or to suggest that under § 5.280 VA must consider the combined effect of multiple disabilities in determining whether an extra-schedular award is appropriate.

VA never intended that § 3.321, nor initially proposed § 5.280, apply in either of those ways but rather that they be applied individually to each specific disability being evaluated. Therefore, we propose to use only the singular form of "disability", and to replace the word "case" with "disability" in the second sentence of § 5.280(b)(1), to clarify this point. We also propose several other, non-substantive changes to improve readability of paragraph (b)(1).

§ 5.281 Multiple 0 percent service-connected disabilities.

Initially proposed § 5.281 stated:

> VA may assign a 10 percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10 percent rating if the veteran has any other compensable rating.

One commenter suggested that for clarity, the second word in this section should be changed from "may" to "shall" to emphasize the mandatory nature of assigning the combined rating. We agree with this suggestion but we use "will" instead of "shall" throughout part 5 because the former is easier for the public to understand. We therefore propose to change "may" to "will" in § 5.281.

§ 5.282 Special consideration for paired organs and extremities.

Initially proposed § 5.282(c) stated that, "If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of such judgment, settlement, or compromise against the increased disability compensation payable under this section."

One commenter suggested that because the VA Schedule for Rating Disabilities does not provide compensation for non-economic loss, such as pain and suffering and loss of enjoyment of life, initially proposed § 5.282(c)(2) should calculate the offset of damages by first reducing the total amount recovered as damages by the amount received for pain and suffering and loss of enjoyment of life. The commenter also

suggested that the amount paid for attorney fees and expenses for that recovery should be subtracted from the total amount recovered as damages.

The relevant statute, 38 U.S.C. 1151 does not allow VA to reduce the offset for any reason. Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.283 Total and permanent total ratings and unemployability.

Initially proposed § 5.283(b) stated that, "VA will consider a total disability to be permanent when an impairment of mind or body, that makes it impossible for the average person to follow a substantially gainful occupation, is reasonably certain to continue throughout the life of the disabled person."

One commenter asserted that it is inconsistent for VA to provide that total disability is permanent only if it is reasonably certain to continue throughout the lifetime of the veteran when the Social Security Administration considers a total disability to be permanent if it is likely to continue for 1 year or lead to death. The commenter asserted that veterans should not have a higher threshold for permanency than Social Security Disability recipients.

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.300 Establishing dependency of a parent.

In initially proposed § 5.300(b)(2)(ii), we stated, "Net worth of a minor family member will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support." This statement was erroneous and inconsistent with § 3.250(b)(2). In fact, a minor's net worth is not considered income. Rather it is considered as a separate matter from income. We therefore propose to revise paragraph (b)(2)(ii) to read, " Net worth of a minor family member will be considered in determining dependency of a parent only if it is actually available to the veteran's parent for the minor's support."

In initially proposed § 5.300 we also failed to address a minor's income. We therefore propose to add a new paragraph (b)(1)(iii) which states, "Income of a minor family member from business or property will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support." This is merely a plain language restatement of the § 3.250(b)(2) provision quoted above.

5.304 Exclusions from income—parent's dependency.

Following publication of proposed § 5.304 in AM07, VA published a rulemaking to implement the "Caregivers" provisions of Public Law 111-163. 76 FR 26148 (May 5,

2011). As we stated in the preamble, "The stipend payments to Primary Family Caregivers under 38 U.S.C. 1720G(a)(3)(A)(ii)(V) constitute 'payments [of benefits] made to, or on account of, a beneficiary' that are exempt from taxation under 38 U.S.C. 5301(a)(1). VA does not intend that the stipend replace career earnings." Consistent with that interpretation, we believe that this stipend should not be counted as income when determining parental dependency. We therefore propose to add this exclusion as § 5.304(l) and redesignate previous paragraph (l) as paragraph (m).

C. Special Ratings AL88

In a document published in the Federal Register on October 17, 2008, we proposed to revise Department of Veterans Affairs (VA) regulations governing special ratings, to be published in new 38 CFR part 5. 73 FR 62004. We provided a 60-day comment period, which ended December 16, 2008. We received a submission from one commenter.

§ 5.320 Determining Need for Regular Aid and Attendance

Current 38 CFR 3.352(c) states, "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." Initially proposed § 5.320(a) inadvertently omitted this paragraph. We therefore propose to insert this provision, phrased in a clearer way, into § 5.320(a).

The commenter noted that initially proposed § 5.320(b) differs from current § 3.352(a), from which it derives. The current rule defines "bedridden" as "that condition which, through its essential character, actually requires that the claimant remain in bed." The initially proposed rule defined bedridden as requiring that the claimant "must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of bed rest for purposes of convalescence or cure." The commenter asserted that the change of language "may eliminate the possibility of using proof by lay testimony that remaining in bed is required."

The need for aid and assistance or confinement to bed may be shown by medical treatment records, medical opinions, and competent non-medical evidence based on personal observations. However, the relationship between service-connected disability and need for aid and attendance or confinement to bed as a result of a service-connected disability must be shown by medical treatment records and medical opinions.

VA will always accept and consider lay evidence, even if such evidence cannot be dispositive of a particular factual issue. The consideration of lay evidence in the context of a determination on whether a person is bedridden is no different that the consideration of lay evidence on the context of any other factual determination. Therefore, we propose not to include an instruction regarding lay evidence.

However, the comment revealed that the initially proposed rule was unclear about the meaning of the term "bedridden". Current § 3.352(a) states, "The fact 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" to establish bedridden status. The gist of this qualification is to distinguish the need to stay in bed unremittingly from a need to be in bed intermittently. It is the intermittency that distinguishes being in bed "for the greater or lesser part of the day" from being bedridden, not that convalescence or cure is the reason. If a doctor forbids a person to leave bed because of the person's medical condition, the person would be bedridden, whether the prescribed confinement was for convalescence, cure, or other reason. We propose to revise § 5.320(b) to preserve this point, consistent with § 3.352(a), by stating that the person who is bedridden "must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of periods of intermittent bed rest." Because the reason for the prescribed confinement is irrelevant, we propose to remove the phrase "for purposes of convalescence or cure".

The initially proposed rule required that, "The individual is temporarily or permanently bedridden . . . ." A person who is permanently bedridden logically meets the requirement that he or she is temporarily bedridden. Because being either temporarily or permanently bedridden satisfies the requirement of § 5.320(b), there is no need to qualify "bedridden" as either temporarily or permanently. We therefore propose to remove the phrase "temporarily or permanently" before "bedridden". However, a finding that a veteran is permanently bedridden is significant because such a veteran's special monthly compensation (SMC) will not be reduced based on hospitalization, as we explained in the preamble to the initially proposed rule. See 73 FR 62011, Oct. 17,

2008; see also proposed § 5.724, "Payments and Adjustments to Payments", 73 FR 65212, Oct. 31, 2008. The only statute that requires payment of SMC based on the "permanently bedridden" criterion is 38 U.S.C. 1114(l). Therefore, we have added a cross reference to § 5.324, the regulation that implements section 1114(l). This change will not affect entitlement, because even a person who is temporarily bedridden will qualify for SMC under section 1114(l) (because such a person needs regular aid and attendance). The change is intended to improve clarity in terms of the potential for a reduction based on hospitalization.

Initially proposed § 5.320(b) omitted the sentence from current § 3.352(a) that states, "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." However, we failed to explain that omission in our preamble. We note that initially proposed 5.320(a) already provided for aid and attendance if the claimant meets "any or all" of the listed criteria. Therefore this sentence was unnecessary and we propose not to include it in § 5.320.

§ 5.321 Additional Disability Compensation for a Veteran Whose Spouse Needs Regular Aid and Attendance

At the end of initially proposed paragraph (a), we propose to add a notation that the term "aid and attendance" used in that paragraph is "defined in paragraphs (b) and (c) of this section." The notation is needed to ensure that a reader does not think that the term means only the generally applicable definition set forth in proposed § 5.320.

The commenter addressed the visual impairment criteria of automatic eligibility for regular aid and attendance. Initially proposed § 5.321(b) provided that the spouse of a veteran who is 30 percent disabled is automatically considered in need of regular aid and attendance if the spouse's visual impairment meets one of two criteria: "(1) The spouse has corrected visual acuity of 5/200 or less in both eyes; [or] (2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes". Section 3.351(c)(1), from which proposed § 5.321(b)(2) derives, states, ". . . or concentric contraction of the visual field to 5 degrees or less." The proposed rule specified the bilateral requirement, which VA has long implemented, as we explained in the notice of proposed rulemaking (NPRM). We explained that VA had long used these objective vision criteria to satisfy the regulatory criteria of "blind or so nearly blind". See 38 U.S.C. 1115(1)(E). Noting that the VA Schedule for Rating Disabilities provides only a 30 percent disability rating for unilateral concentric contraction of the visual field to 5 degrees and a rating of 100 percent for bilateral concentric contraction to that degree, we explained that unilateral contraction could not be considered "so nearly blind as to support a need for aid and attendance". We further noted that, although the rating schedule applies to ratings for veterans, there is no rational basis not to apply the same criteria for veterans' spouses in considering the proper standards for determining the need for aid and attendance.

The commenter asserts that there is a rational basis to construe the visual impairment criteria of the need for regular aid and attendance differently for the spouse

of a 30 percent disabled veteran than for a veteran seeking disability compensation for visual impairment. The commenter stated:

> To the contrary, the criterion for granting a veteran, who already has a 30% disability, additional benefits because of having a spouse with a serious visual impairment should be more relaxed than the standard for rating the veteran's own visual impairment. It follows that even a spouse with a unilateral concentric contraction of the visual field to 5 degrees or less would necessarily require regular aid and attendance which would be an additional financial burden on a veteran who is 30% disabled.

We disagree with the commenter for two reasons. First, the aid and attendance criterion of "blind, or so nearly blind" is established by statute. 38 U.S.C. 1115(1)(E)(ii). VA would exceed its authority to "relax" the statutory standard for finding the veteran's spouse in need of regular aid and attendance. As we explained in the initial NPRM, by reference to the VA Schedule for Rating Disabilities, a person with unilateral concentric contraction of the visual field to 5 degrees or less "cannot rationally be considered 'so nearly blind' as to need regular aid and attendance." Section 5.321(b) states an objective measure of vision that VA considers "so nearly blind" as to need regular aid and attendance without further inquiry. It confers the benefit of automatic eligibility without burdening the veteran to prove some other way that his or her spouse is "blind, or so nearly blind" as to need regular aid and attendance. Section 5.321(b) does not deprive the veteran of the ability to establish need for aid and attendance by other means. This is because § 5.321(c) provides for proof of entitlement with any evidence that shows the veteran's spouse in fact needs regular aid and attendance, even, possibly, with evidence of visual impairment that is much less than the impairment that automatically establishes a need for regular aid and attendance.

Second, we disagree that because a veteran is 30 percent disabled the veteran's spouse would necessarily require regular aid and attendance with unilateral concentric contraction of the visual field to 5 degrees or less, or, by implication, with less impairment than prescribed by proposed § 5.321(b). The need for regular aid and attendance is a function of a person's ability to care for himself or herself, not of another's ability to provide financial or other support. Although the veteran's ability to provide for the spouse financially or otherwise could vary in relation to the veteran's disability, it does not logically follow that the spouse's need for regular aid and attendance varies in relation to the veteran's disability. In light of the discussion above, we propose to make no changes based on this comment.

§ 5.322 Special monthly compensation: general information and definitions of disabilities.

In initially proposed § 5.322(a)(1), we stated that multiple regulations allow special monthly compensation (SMC) to veterans who have certain service-connected disabilities. In initially proposed paragraph (a)(2), we stated that certain nonservice-connected disabilities will be considered in determining entitlement to SMC, and we listed the relevant sections. To emphasize that service-connected disability is a prerequisite for SMC, we propose to add this sentence to paragraph (a)(1): "Except as specified in paragraph (a)(2) of this section, the disabilities referred to in §§ 5.323–5.333 must be service connected."

Section 601 of Public Law 111-275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 1114(m) to replace the phrases “at a level, or with complications,” and ‘‘at levels, or with complications,’’ with the phrase “with factors”. The public law also amended section 1114(n) to replace “at levels, or with complications,’’ with the phrase “with factors” and to replace “so near the shoulder and hip as to” with “factors that”. It also amended section 1114(o) to replace “so near the shoulder as to” with “with factors that”. We propose to revise initially proposed §§ 5.322, 5.325-5.330, and 5.334 to conform to this new statutory language.

In the NPRM, we identified many disabilities in those sections as “service connected”. Given that service-connected disability is a requirement for all SMC benefits (except as specifically provided in certain sections), we have determined that it is unnecessary to specify each disability as service connected throughout those sections. We have therefore removed the modifier “service-connected” throughout §§ 5.321 and 5.323–5.333, except where necessary to distinguish the service-connected disability from a nonservice-connected disability.

§ 5.323 Special Monthly Compensation Under 38 U.S.C. 1114(k)

We have reorganized initially proposed § 5.323(b) and moved one sentence from paragraph (b) into a closely related part 5 section. Initially proposed § 5.323(b) stated limitations on SMC under 38 U.S.C. 1114(k). Paragraph (b)(1) stated limitations on combining SMC under 38 U.S.C. 1114(k) with disability compensation under section 1114(a) through (j). Paragraph (b)(2) stated limitations on combining SMC under

section 1114(k) with SMC under 1114(l) through (n). On review, we see that paragraph (b)(1)(ii) stated a limitation germane to paragraph (b)(2). We therefore propose to move it to paragraph (b)(2), and redesignate it as paragraph (b)(2)(i). We propose to redesignate initially proposed paragraph (b)(2) as paragraph (b)(2)(ii).

One provision of initially proposed paragraph (b)(1)(iii) stated that the additional compensation for dependents under 38 U.S.C. 1115 is not subject to the "above limitations", meaning the limitations in initially proposed paragraph § 5.323(b)(1). We propose to move this provision to § 5.240, "Disability compensation", because it pertains to all disability compensation, not just to SMC.

The remainder of initially proposed paragraph (b)(1)(iii) stated that "the additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) [is] not subject to the above limitations regarding maximum monthly compensation payable under this paragraph." To improve clarity, we therefore propose to redesignate this provision of initially proposed paragraph (b)(1)(iii) as paragraph (b)(3) and have clearly identified the excluded limitations as those of § 5.323(b). For consistency throughout part 5, we propose to revise "compensation" to read "disability compensation". As revised, the sentence will read: "The additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) is not subject to the limitations of paragraph (b) of this section regarding maximum monthly disability compensation payable under 38 U.S.C. 1114(k) in combination with other rates."

§ 5.324 Special Monthly Compensation Under 38 U.S.C. 1114(l)

The commenter asserted that as initially proposed, § 5.324(d) violated the "benefit of the doubt" rule of 38 U.S.C. 5107(b) by defining "permanently bedridden" as "reasonably certain that the confinement to bed will continue throughout his or her lifetime." The commenter noted that the benefit of the doubt rule is "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." The commenter argued that to comply with the benefit of the doubt rule, § 5.324(d) should substitute "at least as likely as not" for "reasonably certain". That is, it should read, "It is at least as likely as not that the confinement to bed will continue throughout his or her lifetime."

The statute that § 5.324(d) implements authorizes VA to pay special monthly compensation to a veteran who is "permanently bedridden." 38 U.S.C. 1114(l). We agree that use of the term "reasonably certain" could be misconstrued to require a higher standard of proof than "at least as likely as not". Therefore, we propose to remove "reasonably certain". As revised, the standard of proof would be the default standard, which is the "benefit of the doubt" rule. The "benefit of the doubt rule", found in § 5.3, incorporates the concept of "at least as likely as not."

§ 5.325 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(l) and (m)

We propose to amend the language in § 5.325 for clarity.

§ 5.326 Special Monthly Compensation Under 38 U.S.C. 1114(m)

In initially proposed § 5.326(i), we provided an award of SMC under 38 U.S.C. 1114(m) based on the facts found "[i]f the veteran has . . . concentric contraction of the visual field to 5 degrees or less in both eyes". This paragraph was derived from § 3.350(c)(3), which does not include the "or less" criterion. See 38 CFR 3.350(c)(3) ("[w]ith . . . the vision field reduced to 5 degrees concentric contraction in both eyes"). We did not explain our reason for the addition of the "or less" criterion. Although we did not receive any comments on this issue, we note that in the NPRM for proposed § 5.325(d) we explained our rationale for treating visual acuity of 5/200 or less and concentric contraction of the visual field to 5 degrees or less as equally disabling. See 73 FR 62012, Oct. 17, 2008. In that notice, we also stated our intent to apply the principle of equivalence of visual acuity of 5/200 or less with concentric contraction of the visual to 5 degrees or less "wherever it is applicable". It applies to § 5.326(i).

5.330 Special monthly compensation under 38 U.S.C. 1114(o).

In initially proposed § 5.330(c), we stated one combination of disabilities that qualify a veteran for an award under 38 U.S.C. 1114(o) as follows:
"Total deafness in one ear, or bilateral deafness rated at 40 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with service-connected blindness of both eyes having only light perception or less." We believe the phrase "only light perception or less", which is also contained in current 38 CFR 3.350(e)(1)(iv), may confuse readers because it fails to explain what "less" refers

to. The intent of § 3.350(e)(1)(iv) is to include veterans with only light perception or less vision, so we propose to add the word vision at the end of § 5.330(c).

The preamble to initially proposed 5.330 stated, "We will not repeat § 3.350(e)(4) and the third and fourth sentences of § 3.350(e)(3). These sentences are redundant of § 3.350(e)(1)(ii). . ." In fact, we actually omitted the second through fourth sentences, for the same reason.

5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2)

Section 601 of Public Law 111-275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 1114 by adding a new paragraph (t) which provides:

> Subject to section 5503(c) of this title, if any veteran, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under subsection (r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, the veteran shall be paid, in addition to any other compensation under this section, a monthly aid and attendance allowance equal to the rate described in subsection (r)(2), which for purposes of section 1134 of this title shall be considered as additional compensation payable for disability. An allowance authorized under this subsection shall be paid in lieu of any allowance authorized by subsection (r)(1).

We propose to add a new paragraph (c)(7) to initially proposed § 5.332 to implement this statutory change.

§ 5.333 Special Monthly Compensation Under 38 U.S.C. 1114(s)

In Bradley v. Peake, issued after § 5.333 was initially proposed, the U.S. Court of Appeals for Veterans Claims held that under VA's existing regulation (38 CFR 3.350(i)) entitlement to SMC under section 1114(s) may be provided to a claimant who was assigned "a TDIU [total disability based on individual unemployability] rating based on a single disability to satisfy the statutory requirement of a total rating." Bradley, 22 Vet. App. 280, 293 (2008). To clearly implement the court's holding, we propose to revise the first paragraph of initially proposed § 5.333 to state:

> Special monthly compensation under 38 U.S.C. 1114(s) is payable to a veteran who has a single disability rated 100 percent disabling under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter, or a disability that is the sole basis for a rating of total disability based on individual unemployability (TDIU) under § 4.16 of this chapter, and [additional disabilities as described in either paragraph (a) or (b) of § 5.333].

We propose to revise paragraphs (a) and (b) so that they will be clear when read in connection with these revisions.

§ 5.336 Effective Dates: Additional Compensation for Regular Aid and Attendance Payable for a Veteran's Spouse Under § 5.321

We propose to revise § 5.336(a)(2) to be in the active voice and to improve clarity. In initially proposed paragraph (a)(2), we stated, "[retroactive] regular aid and

attendance for the spouse will also be awarded". We now propose to clarify that the benefit paid is properly called "additional compensation" for regular aid and attendance. Also, initially proposed paragraph (a)(2) referred to a spouse's "entitlement to regular aid and attendance". However, it is the spouse's need for, not entitlement to, regular aid and attendance that is the basis for the additional compensation. We therefore propose to change the reference to "entitlement" to a reference to "need". The whole sentence will read, "When VA awards disability compensation based on an original or reopened claim retroactive to an effective date that is earlier than the date of receipt of the claim,VA will also award additional compensation for any part of the retroactive period during which the spouse needed regular aid and attendance."

Title 38 CFR 3.501(b)(3) states that the effective date for discontinuance of additional compensation paid based on a spouse's need for regular aid and attendance is the, "[e]nd of month in which award action is taken if need for aid and attendance has ceased." Initially proposed paragraph (b) stated, "The effective date for the discontinuance of regular aid and attendance will be the end of the month in which VA stops paying the aid and attendance." The proposed regulation incorrectly stated that VA will stop paying the benefit when we discontinue the benefit. It also failed to identify the reason for the discontinuance: the spouse no longer needs regular aid and attendance. We propose to remedy these two defects by revising the sentence to read, "If the veteran's spouse no longer needs regular aid and attendance, VA will discontinue additional compensation effective the end of the month in which VA takes the award action to discontinue."

5.337 Award of special monthly compensation based on the need for regular aid and attendance during period of hospitalization.

We have determined that initially proposed § 5.337 is redundant of § 5.720(f). We therefore propose to delete § 5.337 from part 5.

§ 5.350 Benefits Under 38 U.S.C. 1151(a) for Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

Initially proposed § 5.350 erroneously included applicability date rules derived from current § 3.361(a)(1) and (2). Those rules pertain, respectively, to the applicability date of § 3.361 to claims for benefits under 38 U.S.C. 1151(a) generally, and to claims for benefits related to compensated work therapy specifically. No regulation in part 5 will apply before the applicability date of part 5 as a whole, which will be on a date prescribed in the final rule. Consequently, we erred in restating in initially proposed § 5.350 the applicability dates prescribed in § 3.361. We now propose not to include them in § 5.350. We also propose to similarly revise initially proposed §§ 5.351 and 5.353, which also involve benefits under section 1151.

Section 3.800(a), "Disability or death due to hospitalization, etc.", provides that:

> 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.

In initially proposed § 5.350, we failed to include a similar basic explanation of the benefits payable under 38 U.S.C. 1151. To correct this omission, we propose to insert similar language as new paragraph (a).

In initially proposed § 5.350(g), we stated, "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." This paragraph is unnecessary because we use the term "dependency and indemnity compensation" in new paragraph (a), and part 5 will not govern any claims filed on or before December 31, 1956. We therefore propose to delete paragraph (g).

§ 5.352 Effect of Federal Tort Claims Act Compromises, Settlements, and Judgments Entered After November 30, 1962, on Benefits Awarded Under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

For the same reasons explained above as to § 3.350, we propose to delete initially proposed paragraph (a), which had stated that this rule applied to claims received after September 30, 1997. Accordingly, we propose to redesignate initially proposed paragraph (b) as paragraph (a), proposed paragraph (c) as paragraph (b),

and proposed paragraph (d) as paragraph (c). We propose to remove unnecessary language from these paragraphs for clarity.

We propose to add paragraph (d), "Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39", to initially proposed § 5.352. Section 304(c) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1151(b) by adding section 1151(b)(2) relating to offset of chapter 21 and 39 benefits. VA amended current § 3.362 in August 2006 by adding paragraph (e) to that section to implement the part of 38 U.S.C. 1152(b) pertaining to 38 U.S.C. chapter 39. On September 23, 2010, VA amended § 3.362(e) to implement 38 U.S.C. 1151(b) pertaining to 38 U.S.C. chapter 21. See 75 FR 57859. Initially proposed § 5.352 omitted a counterpart to § 3.362(e). We now propose to add the language of § 3.362(e), reorganized for clarity.

§ 5.360 Service Connection of Dental Conditions for Treatment Purposes

Initially proposed § 5.360 was based on 38 CFR 3.381 as it existed at the time (2008). See 73 FR 62004. VA revised § 3.381 on January 30, 2012 (77 FR 4469). This amendment was intended to clarify the language of § 3.381 by adding a new introductory paragraph (a) explaining the types of issues that VBA adjudicates in a dental claim. VA also added a sentence to § 3.381(b) explaining that, "These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter."

We propose to revise initially proposed § 5.360(a), “General Principles”, to incorporate the new introductory paragraph (a) of § 3.381 and to add a statement explaining what service connection for treatment purposes means. We likewise propose to include the second sentence of § 3.381(b) in § 5.360(c)(3). We also propose to revise initially proposed § 5.360 to simplify the provisions, to state the provisions in the active voice, to specify which Administration within VA must make which determinations, and to reorder the provisions in a more logical sequence.

We propose to change the sequence of the paragraphs, designating paragraph (b) as (c), paragraph (c) as (e), paragraph (d) as (b), and paragraph (e) as (d). It is more logical to include the paragraphs concerning what VA will service connect for treatment purposes together and in sequence and before the paragraph that provides for the conditions VA will not service connect for treatment purposes.

In proposed paragraph (c) (initially proposed paragraph (b)), we propose to rephrase the first sentence to state it in the active voice. We propose to remove the modifier, “chronic” from periodontal disease in paragraph (iv) because VA will treat any periodontal disease in a veteran who is eligible for treatment in accordance with the provisions of § 17.161 of this chapter. Periodontal disease, whether labeled acute or chronic, is classified based on the severity of the disease. Gingivitis, which is acute and treatable, is a milder form of periodontal disease. Periodontitis, which is chronic, is the condition that develops if gingivitis is untreated. Since these are essentially different stages of the same disease, VA will treat both stages.

We propose to remove the phrase, “outpatient dental” from the first sentence of paragraph (e) (initially proposed paragraph (c)) because it is redundant and unnecessary. This entire section concerns service connection of dental conditions for treatment purposes. It is immaterial whether VA treats the veteran as an outpatient or while hospitalized. We also propose to remove “acute periodontal disease” from the list of conditions that VA will not service connect for treatment purposes for the reasons stated earlier. We propose to redesignate the subsequent paragraphs accordingly.

§ 5.365 Claims Based on the Effects of Tobacco Products

Initially proposed § 5.365 restated § 3.300 essentially without change. Initially proposed § 5.365(b)(1) stated: “The disability or death resulted from injury or disease that is otherwise shown to have been incurred or aggravated during service, which means that the disability or death can be service connected on some basis other than the veteran's use of tobacco products during service.” The phrase “otherwise shown to have been incurred or aggravated” quotes paragraph (b) of the authorizing statute, 38 U.S.C. 1103. However, we have determined that the phrase “the disability or death can be service connected on some basis other than the veteran’s use of tobacco products during service” is the premise of the paragraph. The other language in the initially proposed paragraph is superfluous. We therefore propose to remove this other language.

We also determined that the phrase, “the disability became manifest or death occurred during service”, which appeared in initially proposed (b)(1), is a separate exception to paragraph (a). We therefore propose to designate it paragraph (b)(2). Consequently, we propose to redesignate initially proposed paragraph (b)(2) as (b)(3) and initially proposed paragraph (b)(3) as (b)(4).

We further propose to change the word “appeared” in initially proposed paragraph (b)(2), redesignated paragraph (b)(3), to “manifested” because the cited sections, §§ 5.260 through 5.268, use the word “manifested”. Likewise, 38 U.S.C. 1103(b) uses the word “manifest”.

In the preamble to the initially proposed rule, we explained that we were not repeating the first clause of § 3.300, ‘‘For claims received by VA after June 9, 1998,’’ because all claims under part 5 will be received after 1998. We have noted that one of the authority citations listed in initially proposed § 5.365 was 38 U.S.C. 1103 note. Because this note only concerns this effective date provision, we propose to omit it from § 5.35.

§ 5.367 Civil Service Preference Ratings for Employment in the U.S. Government

Initially proposed § 5.367 was not explicit as to the purpose of the civil service preference ratings. We now propose to clarify that these ratings are for “employment by the U.S. government”. This clarification is consistent with current practice.

The second sentence stated, “Any directly or presumptively service-connected injury or disease that exhibits some extent of actual impairment may be held to exist at the level of less than 10 percent.” This implied a two-step process in which VA found “actual impairment” and then assigned a rating of less than 10 percent. In fact, there is only one step: if a veteran has any actually disabling directly or presumptively service-connected disability he or she will qualify for the civil service preference. We propose to revise the sentence to say this explicitly.

§ 5.368 Basic Eligibility Determinations: Home Loan and Education Benefits

In initially proposed § 5.368(a)(1), we stated that claims based on service after January 31, 1955, and before August 5, 1964; or after May 7, 1975, would be governed by the presumption of aggravation in current § 3.306(a) and (c). This was derived from current § 3.315(b). However, the current rule is incorrect, and should refer to § 3.306(b), which applies to all claims based on service after December 7, 1941. We will state the rule correctly in part 5. We propose to make the same correction to paragraph (b)(4).

XI. Subpart F: Nonservice-Connected Disability Pensions and Death Pensions Improved Pension

A. Improved Pension

In a document published in the Federal Register on September 26, 2007, we proposed to revise VA’s regulations governing Improved Pension benefits, to be

published in a new 38 CFR part 5. 72 FR 54776. We provided a 60-day comment period that ended November 26, 2007. We received no comments.

Although we received no comments regarding our publication on September 26, 2007, an internal review of initially proposed Subpart F revealed several drafting errors that needed to be corrected, and we propose to do so. We also propose to make organizational and technical changes to improve the clarity of the regulations, and to maintain consistency throughout part 5.

§ 5.370 Definitions for Improved Pension

We propose to add a general definition of "Improved Pension", as § 5.370(d), to be consistent with our practice of providing general definitions for the benefits provided by VA. See, for example, §§ 5.240(a) (defining disability compensation) and 5.460 (defining certain VA pension programs). The text of the definition is based on the text of what was initially proposed as § 5.371, with minor revisions to improve clarity.

We also propose to add a definition of "Improved Pension payment amount" as paragraph (e), which is "the monthly payment calculated under § 5.421(a)".

In the definition of "Maximum annual pension rate", proposed paragraph (f), we changed the reference to § 5.400 from "The various types of maximum annual pension rates are set forth at § 5.400" to "Maximum annual pension rates are described in

§ 5.400". Section 5.400 does not "set forth" any rates; it merely refers the reader to title 38, United States Code.

In this revised version of § 5.370, we would add a definition of "net worth in proposed paragraph (g)" as "the value of real and personal property, as calculated under § 5.414". This is a general definition, and is consistent with common usage of the term; however, it will be useful to provide a definition in this central location of § 5.370, where it will guide readers to the relevant (and more detailed) substantive rules in § 5.414.

In § 5.370, we initially proposed to define "special monthly pension" as:

> [A] type of Improved Pension with higher maximum annual pension rates than the basic rates listed in § 5.400(a)(1) and (5). Special monthly pension is based on a veteran's or surviving spouse's disability or disabilities ratable at 60 percent or more, their housebound status, or their need of the aid and attendance of another person in performing their daily living habits.

We propose to revise the definition in proposed paragraph (i) to make it more general; specific entitlement criteria are more appropriately discussed in the substantive rules at §§ 5.390 and 5.391. There is no need to restate those criteria here. We will explicitly note in the definition that claimants for special monthly pension must meet the eligibility criteria for Improved Pension, notwithstanding that this is implied by the definition of special monthly pension as a "type of Improved Pension".

We propose to delete the initially proposed definition of "surviving child" as unnecessary and redundant of other material in part 5.

§ 5.371 Eligibility and Entitlement Requirements for Improved Pension

We propose to revise § 5.371(a) so that it is in the active voice and so that it specifically refers to special monthly pension, where, in the initially proposed version, it applied only implicitly to special monthly pension. In addition, we propose to delete from paragraph (a) the material that was moved to the definition in § 5.370.

Initially proposed paragraph § 5.371(c) states the general rules for the eligibility requirements to Improved Death Pension for a surviving spouse or surviving child. We propose to add cross-references in § 5.371(c)(1) and (2) to the part 5 regulations relating to status as a surviving spouse, and surviving child.

We propose to clarify paragraph § 5.371(c) by moving the material in initially proposed § 5.371(c)(3) to the beginning of the paragraph. The purpose of the language is to explain that in determining eligibility for Improved Death Pension, it does not matter whether the veteran's death is service-connected.

§ 5.372 Wartime Service Requirements for Improved Pension

We propose to add the word "nonconsecutive" to § 5.372(b)(2), to illustrate that, unlike the period described in paragraph (b)(1), the days need not be consecutive to meet this requirement. Indeed, if the days were consecutive, the service described in

paragraph (b)(2) would meet the requirements of paragraph (b)(1). We do not need to add the word "nonconsecutive" to paragraph (b)(3) because that paragraph explicitly requires two separate periods of service.

Initially proposed § 5.372(b)(4)(ii) provided wartime service if the veteran served for any period of time during a period of war and had a disability "at the time of discharge that in medical judgment would have justified a discharge for disability". This requirement appears in current § 3.3(a)(3)(ii). In part 5, we will remove the "medical judgment" requirement. Instead, we will require that the veteran have "had such a service-connected disability at the time of discharge that would have justified discharge." This change will recognize that in some cases lay evidence may be sufficient to establish the existence of a disability that could have served as a basis for discharge.

In addition, we propose to improve the clarity of the paragraph by specifying that the disability that existed at discharge must be one for which service connection is granted without relying on a presumption. This is consistent with current § 3.3(a)(3)(ii).

§ 5.373 Evidence of Age in Improved Pension Claims

In initially proposed § 5.373, we stated that the regulation applies when age "is material to the decision of an Improved Pension claim". It is possible to misread this language as a narrowing of the current rule, such that the new rule would apply only

when age is outcome determinative. We therefore propose to remove the phrase "the decision of". As revised, the part 5 rule will be substantively identical to the current rule.

§§ 5.380 Disability Requirements for Improved Disability Pension; 5.381 Permanent and Total Disability Ratings for Improved Disability Pension Purposes; and 5.382 Improved Disability Pension – Combining Disability Ratings

We propose to significantly revise §§ 5.380, 5.381, and 5.382 by combining the initially proposed regulations, removing redundant material, correcting errors, and otherwise improving clarity. In addition, we propose to reserve §§ 5.381 and 5.382, and several other changes as discussed below.

In § 5.380(a), we propose to add guidance on how VA combines disability ratings to determine whether a veteran is permanently and totally disabled for Improved Pension purposes. This guidance was initially contained in proposed § 5.382(b). We now propose to move § 5.382(b) to § 5.380(a) because it is more logical to state that provision in § 5.380(a) along with the other disability requirements. We also propose to eliminate § 5.382(a) because in the case, as here, where a veteran has multiple disabilities, all disabilities are combined in the same manner, regardless of whether the disability is service or non-service connected. We now propose to mark § 5.382 as reserved.

In initially proposed § 5.380, we failed to explain our omission of current 38 CFR 3.342(b)(5). We consider that paragraph to be a comingled authority citation and cross reference and we therefore believe it is unnecessary in part 5.

Initially proposed § 5.381(b)(2), which is now § 5.380(c)(2), consisted of seven sentences that were not logically organized and were not stated clearly. We propose to reorganize the material. In sentence one, we propose to replace "consistent with the evidence in the case" with "that is shown by the evidence", because that phrase has the same meaning as "consistent with the evidence" and is easier for the public to understand. For the same reason, we propose to use the phrase "that is shown by the evidence" in paragraphs (c)(2)(i) through (iii). The remaining material will be divided into three separate paragraphs, § 5.380(c)(2)(i) through (iii), to distinguish between generally applicable rules, rules that apply to cases involving disabilities that require hospitalization for indefinite periods, and special rules that apply only in tuberculosis cases.

In what was initially proposed as § 5.381(b)(3), which is now proposed § 5.380(c)(3), we propose to remove language requiring VA to give "special consideration" to veterans under 40 years of age. As revised, the regulation will describe how VA determines the permanence of total disability in such veterans, without suggesting that VA treats these veterans in a "special" way, that is, without suggesting that these veterans are not entitled to the same treatment as any other veteran.

In initially proposed § 5.381(b)(4), which is now § 5.380(c)(4), we propose to change “presumed” to “considered” to be consistent with the current regulation, § 3.342(b)(4), and the statute, 38 U.S.C. 1718(g). “Considered” is more favorable to veterans because it establishes a rule rather than a rebuttable presumption.

In initially proposed § 5.381(b)(4)(i), which is now § 5.380(c)(4)(i), we repeated a typographical error from § 3.342(b)(3)(i) by using “member-employer”. The correct term is “member-employee”. Compare 50 FR 36632, Sept. 9, 1985 (proposed amendment of § 3.342(b)(4) using “member-employee”) with 50 FR 52775, Dec. 26, 1985 (final rule amending § 3.342(b)(4) using “member-employer”).

In initially proposed § 5.381(b)(5), which is now § 5.380(c)(5), we had cross-referenced a part 5 regulation that would be based on current 38 CFR 3.321(b)(2) (concerning extra-schedular ratings for pension). We have since decided against establishing a separate regulation based on that current rule. Thus, in the revised § 5.380(c)(5), we propose to include a rule equivalent to current 38 CFR 3.321(b)(2).

§ 5.383 Effective Dates of Awards of Improved Disability Pension

We have determined that initially proposed § 5.383(a)(2) is an exception to the general effective date rule for Improved Disability Pension. It deals with previously denied claims, and we propose to name it as addressing such claims and redesignate it as paragraph (b). What was previously proposed paragraph (b) will now be proposed paragraph (c).

We propose to revise § 5.383(b)(3), eliminating the description of an incapacitating disability, which was circular and confusing. The revised language will also affirmatively state that a disability that requires extensive hospitalization is an incapacitating disability for Improved Disability Pension purposes, whereas the initially proposed language appeared to establish a rebuttable presumption to the same effect. Compared to current § 3.400(b)(1)(ii)(B) and to the initially proposed rule, the revised rule is easier to understand and apply. Consequently, this will be a change from both part 3 and the initially proposed rule, but it will result in a clearer regulation and will not lead to later effective dates of awards to disabled veterans.

§ 5.390 Special Monthly Pension for a Veteran or Surviving Spouse Based on the Need for Regular Aid and Attendance

Initially proposed § 5.390 was titled, "Special monthly pension for veterans and surviving spouses at the aid and attendance rate." We propose to revise the title to read, "Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance." The revision is in part to help clarify that special monthly pension is essentially Improved Pension paid at a higher maximum annual pension rate. The revision also makes the reference to regular aid and attendance consistent with our terminology in the rest of part 5.

We propose to make significant clarifications, eliminate redundancy, and otherwise simplify the introductory paragraph, proposed as § 5.390(a).

In initially proposed § 5.390(b)(4), which is now § 5.390(d), we had cross-referenced § 5.333 for the rules to govern factual need for aid and attendance. We propose to change this citation to § 5.320 because we propose to renumber the regulation.

§ 5.391 Special Monthly Pension for a Veteran or Surviving Spouse At the housebound rate

In initially proposed part 5, there are several regulations that define "permanently housebound" as it applies to the veteran and the surviving spouse. To ensure consistency throughout part 5, we propose to change the definition in § 5.391(a)(2), to the language used in proposed § 5.511(c). Proposed paragraph (a)(2) will now define the term to mean that the veteran is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and that it is reasonably certain that such disability or disabilities will not improve during the veteran's lifetime.

Initially proposed §5.391(b) was a new provision intended to reconcile current VA regulations, which have not been altered since being promulgated in 1979, with Hartness v. Nicholson, 20 Vet. App. 216 (2006). In that case, the United States Court of Appeals for Veterans Claims (CAVC) stated that current § 3.351(d) does not consider the interpretive effects of 38 U. S.C. 1513(a), first enacted in 2001, on 38 U.S.C. 1521(e). See Hartness, 20 Vet. App. at 221. The CAVC held that, according to these

statutes, a veteran who is otherwise eligible for Improved Pension based on being age 65 or older, and who is not in need of regular aid and attendance, is entitled to special monthly pension at the housebound rate if he or she has a disability ratable at 60 percent or more or is considered permanently housebound. See Hartness, 20 Vet. App. at 221-22. The court held that such a veteran, unlike a veteran who is under 65 years old, need not have a disability that is permanent and total. See id.

However, in 2012, the U.S. Court of Appeals for the Federal Circuit overturned Hartness. In Chandler v. Shinseki, 676 F.3d 1045 (Fed. Cir. 2012), the court stated:

> This court concludes § 1513(a) only eliminates the permanent and total disability requirement in § 1521(a), which applies to all § 1521 subsections. The language of section 1521 is structured so that subsection (a) is a threshold requirement and the other subsections recite additional requirements for a veteran to qualify for different pension rates. As such, § 1521's language and structure, when viewed in light of the statute's purpose and meaning, suggest that the parenthetical exclusion in section 1513(a) refers only to the threshold requirement found in section 1521(a) for pension benefits under § 1521 and not to the additional [housebound] requirements imposed by § 1521(e). *slip op* at 11.

We therefore propose to delete § 5.391(b) and reorder the section paragraphs accordingly.

§ 5.392 Effective Dates of Awards of Special Monthly Pension

Although it was technically accurate, initially proposed § 5.392, "Effective dates of awards of special monthly pension", was unnecessarily complex. In paragraph (a), we had stated the general rule that the effective date of an award of special monthly pension was the date VA received the claim for special monthly pension or the date entitlement arose, whichever date is later. This is essentially the same as the effective

date of an award of Improved Pension under §§ 5.383 and 5.431, except that it does not address the eligibility or entitlement criteria for Improved Pension. It is unnecessary for the special monthly pension effective date regulation to address such criteria, because the claimant must have met those criteria as a prerequisite for the award. Moreover, in cases where a claimant who was not already receiving Improved Pension is awarded special monthly pension, the claim for Improved Pension constitutes the claim for special monthly pension, because special monthly pension is a form of Improved Pension paid at a higher maximum annual pension rate. Thus, the award of special monthly pension is predicated upon the same rules that govern the award of Improved Pension, and the award of special monthly pension will be effective on the same date as the award of Improved Pension in every situation except where entitlement to special monthly pension arose after the date of entitlement to Improved Pension. This could occur in a case where an Improved Pension beneficiary files a new claim for special monthly pension, or where a claimant seeking Improved Pension incurs, after filing the Improved Pension claim, additional disability that makes him or her eligible for special monthly pension. Hence, we propose to revise the rule to simply state that the effective date of an award of special monthly pension will be the later of either the effective date of the award of Improved Pension under § 5.383 or the award of Improved Death Pension under § 5.431, or the date entitlement to special monthly pension arose.

In initially proposed § 5.392 we failed to include the provisions of 38 CFR 3.402(c)(1), concerning aid and attendance, and housebound benefits payable to a surviving spouse. We propose to correct this omission by adding a reference to

proposed § 5.431, “Effective dates of Improved Death Pension”. We also omitted the provisions of § 3.402(c)(2), concerning concurrent receipt of Improved Pension and Improved Death Pension. We propose to correct this omission by adding a new paragraph (b).

In initially proposed § 5.392(b), we stated an exception applicable “when an award of Improved Pension is effective retroactively”. This refers to the retroactive provisions in § 5.383(b). By referencing § 5.383 in its entirety in § 5.392(a), the simplified version of paragraph (a) will eliminate the need for this exception.

§ 5.400 Maximum Annual Pension Rates for a Veteran, Surviving Spouse, or Surviving Child

After reviewing initially proposed § 5.400, we propose to make several changes, including redesignating due to the removal and revision of certain paragraphs, described below.

We determined that it would be helpful for readers to know that the rates of pension are listed on the Internet. We therefore propose to add the following sentence to what is now the introductory paragraph (which, as initially proposed, was designated as paragraph (a)): “Current and historical maximum annual rates can be found on the Internet at http://www.va.gov or are available from any Veterans Service Center or Pension Management Center.” We propose to include “Pension Management Center” because most pension cases are processed in these three centers. We propose to

remove from that paragraph language related to 38 U.S.C. 5312 because it was redundant of § 5.401. For similar reasons, we propose to add "Pension Management Center" to initially proposed § 5.471(a).

Also in reviewing this section, we found that what is now designated as paragraph (e) could be simplified to refer only to a surviving spouse. The authorizing statute for that paragraph addresses the different rates based on whether or not the spouse has custody of a child of the deceased veteran.

We propose to delete initially proposed § 5.400(b), pertaining to World War I veterans, because VA does not have any Improved Pensioners on its rolls who served in World War I and does not expect to receive any new claims from such veterans. If any claims are received, they may be adjudicated in accordance with 38 U.S.C. 1521(g), which provides the higher rate for such veterans.

Finally, we propose to move the information that had been contained in initially proposed § 5.400(c), concerning higher maximum annual pension rates based on the number of dependents, to the second sentence of what is now the introductory paragraph. We were concerned that the separate paragraph would lead a reader to think that paragraph (c) was an exception to the information in the introductory paragraph when, in fact, the statutes referred to in the introductory paragraph provide the higher rates.

§ 5.401 Automatic adjustment of maximum annual pension rates.

We propose to omit a counterpart to § 3.23(c) from § 5.401. The preamble to initially proposed *§* 5.401(b), 72 FR 54776, 54782-54783 (Sept. 26, 2007), stated that it derives, in part, from *§* 3.23(c), which provides for publication of increases in the rate of pension paid to Mexican border period and World War I veterans. As explained in the initial, 72 FR 54776, 54782, and current preambles for *§* 5.400, part 5 will not repeat 3.23(c) because it is obsolete. Consequently, though proposed 5.401(b) restates the requirement to publish increases in the rate of certain benefits, VA will not publish increased in the rate for veterans of the Mexican border period or World War I, and *§* 5.401(b) does not partly derive from *§* 3.23(c).

§ 5.410 Countable Annual Income

We propose to clarify § 5.410(a)(1) and make its phrasing parallel in structure to paragraph (a)(2) for consistency.

In initially proposed § 5.410(b)(3), we stated that: "The income of a surviving child includes the income of that child's custodial parent and the income of other surviving children as described in § 5.435, 'Calculating annual Improved Pension amounts for surviving children.'" The preamble to the initially proposed rule explained that the rule regarding whose income must be included in a surviving child's income was "too complex to be included in this regulation, so we propose to include a cross-reference to proposed § 5.435". However, § 5.435 requires including the income of the surviving child's custodian, irrespective of whether the custodian is a "custodial parent".

Thus, the reference in § 5.410(b)(3) to "custodial parent" was improperly narrow. We therefore propose to change the term "custodial parent" to "custodian". This change corrects the erroneous reference to a "custodial parent" in the proposed rule. We also propose to clarify in paragraph (b)(3) that the income of a surviving child includes that child's income, to make the provision consistent with paragraphs (b)(1) and (2).

We propose to add paragraphs (c)(3)(i) and (ii) to address overlapping irregular income. This type of income was not previously addressed. This change follows current VA practice.

§ 5.411 Counting a Child's Income for Improved Pension Payable to a Child's Parent

In reviewing initially proposed § 5.411, we determined that this section could be much clearer, and we also identified several problems with the initially proposed regulation.

In paragraph (a), we propose to now state the general rule, which is that "VA counts as income to the parent-beneficiary (that is, the veteran or surviving spouse receiving Improved Pension) the annual income of every child of the veteran who is in the parent-beneficiary's custody". In current § 3.23(d)(4) and (5), this rule is phrased as a presumption: "There is a rebuttable presumption that all of such a child's income is available to or for the [parent-beneficiary]." Using a presumption makes this rule far more complicated than it needs to be. Moreover, neither the current regulation nor the

initially proposed part 5 regulation clearly stated that the parent-beneficiary must specifically seek to rebut the presumption. Thus, in § 5.411(a), we propose to state that the child's income is counted as income to the parent-beneficiary unless the parent-beneficiary files a claim to exclude all or part of the child's income.

We also, in paragraph (a), propose to establish a duty on the part of VA to provide the proper VA form to describe the bases for the exclusions that follow. VA uses VA Form 21-0571, "Application For Exclusion Of Children's Income", to gather the information needed to calculate whether a parent-beneficiary qualifies for an exclusion. Much of the specificity that we have added to § 5.411 in this rulemaking is derived from that form, and using that form simplifies the process and greatly reduces the burden of seeking an exclusion under this rule.

In initially proposed § 5.411(b), we set forth the first basis for an exclusion of the child's income, which is that the income is not considered available for expenses necessary for reasonable family maintenance. We propose to change the term "reasonably available" to "considered available" for clarity. This rule is similar to the current and initially proposed rules, except that in paragraph (b)(2) we provide specific examples of common ways to establish that income is not considered available. These examples are derived from current VA practice and VA Form 21-0571.

In § 5.411(c), we describe the hardship exclusion. The calculation required under paragraphs (c)(1) through (5) was included in the initially proposed rule and is set forth in current § 3.272(m), but it is not clearly described as a mathematical formula. This subsequently proposed rule more clearly shows how VA calculates the amount of the hardship exclusion.

In paragraph (b)(1), we propose to add that annual expenses cannot include "expenses for items such as luxuries, gambling, and investments". This guidance is based on long-standing VA practice and will clarify for VA employees what types of expenditures are, or are not, necessary to support a reasonable quality of life.

Finally, we propose to move what was initially proposed as § 5.411(c), "Child's earned income", to § 5.412(a). This provision was mistakenly included in § 5.411, but it applied, by its terms, to calculating a child's income in all situations. Hence, we have moved it to § 5.412(a), where it is more appropriately located. We propose to redesignate the paragraphs of initially proposed § 5.412 to accommodate the new paragraph (a).

§ 5.412 Income Exclusions for Calculating Countable Annual Income

In Osborne v. Nicholson, 21 Vet. App. 223 (2007), the court held that "pursuant to § 3.272(e), the receipt of accrued interest on the redemption of a savings bond is 'profit realized from the disposition of . . . personal property' and is therefore excluded from income for VA pension purposes." A GC Opinion was issued based on this ruling,

VAOPGCPREC 2-2010 (May 10, 2010). The GC Opinion stated that the holding of Osborne v. Nicholson depended not on the political entity that issued the bond, but rather on the terms of the bond. The Opinion further stated that "If a bond requires redemption for the payment of accrued interest. . . then the statutory exclusion for profit realized from the disposition of real or personal property applies. If accrued interest is payable on the bond without redemption, then it does not qualify for the exclusion." This income exclusion also applies to interest received from the surrender of a life insurance policy. However, if a bond pays interest semiannually without the redemption of such bond, VA will consider the interest received as income. The GC Opinion also held that the exclusion of interest received from the redemption of a bond applies to income calculations in parents' dependency and indemnity compensation (DIC), Improved Pension, and Section 306 Pension. Section 3.262(k) excludes from income the accrued interest received from the redemption of a savings bond for purposes of Section 306 Pension and parents' DIC to the extent that § 3.272(e) excludes such income in Improved Pension. Conversely, there is no profit exclusion for Old-Law Pension in § 3.262(k)(3). VA will therefore consider as income the interest received from the surrender of a bond or life insurance in Old-Law Pension. Although not specifically stated in the Opinion, we believe that this exclusion also applies in the income calculation for the dependency of a parent for purposes of disability compensation. This interpretation is considered to be just and consistent with the intent of the statute.

We therefore propose to incorporate the holding of the GC Opinion in proposed § 5.412(e). We also propose to include similar changes in §§ 5.302(d), "General

income rules – parent's dependency", 5.472, "Evaluation of income for Old-Law Pension and Section 306 Pension", and 5.533, "Income not counted for parent's dependency and indemnity compensation."

In initially proposing this subpart, we inadvertently omitted § 3.272(x) (listing "lump-sum proceeds of any life insurance policy on a veteran" as an item VA will not count when calculating countable income for Improved Pension), so we propose to insert § 5.412(l)(8) as its part 5 equivalent.

We propose to move the broad provision proposed as § 5.412(k)(8) to § 5.412(m).

Section 604 of Public Law 111-275, 124 Stat. 2864, 2885 (2010) amended 38 U.S.C. 1503(a) to exclude payment of a monetary amount of up to $5,000 to a veteran from a State or municipality that is paid as a veterans benefit due to injury or disease from countable income for purposes of Improved Pension. We propose to add this exclusion as § 5.412(n).

§ 5.413 Income Deductions for Calculating Adjusted Annual Income

In reviewing initially proposed § 5.413, we determined that this section could be clarified. We propose to revise the language, particularly in paragraph (b), to more accurately reflect current policy. These changes will not alter the legal effect of this section. In paragraph (b), we propose to add a cross-reference to § 5.707, "Deductible

Medical Expenses," to be consistent with § 5.474, "Deductible Expenses for Section 306 Pension Only", and § 5.532, "Deductions from income for parent's dependency and indemnity compensation."

We propose to revise paragraphs (b)(2)(i) and (ii). As initially proposed, the provision could be interpreted to permit deductions for a member of the household "for whom there is a moral or legal obligation of support" on the part of the beneficiary, irrespective of whether that person was a relative of the beneficiary. The part 3 rule, located in § 3.272(g)(1) and (2), requires that the person be both a relative and a member of the household. We propose to revise § 5.413(b)(2) so that it accords with the current rule. We also propose to correct an error in initially proposed paragraph (b)(2)(i). The initially proposed provision and the current rule, § 3.272(g)(1)(i) and (ii), refer incorrectly to the veteran's "spouse" instead of referring to the veteran's "dependent spouse".

In paragraphs (c)(2)(ii) and (iii), we propose to remove a reference to "just debts" because "just debts" are included in the definition of final expenses set forth in paragraph (c)(1).

We propose to remove the reference to chapter 51 and § 5.551(e) in § 5.413(c)(3)(i). The current rule, § 3.272(h)(1)(ii), and the authorizing statute, 38 U.S.C. 1503(a)(3), only reference "expenses not reimbursed under chapter 23 of this title". We propose to revise § 5.413(c)(3)(i) so that it accords with them.

We also propose to clarify § 5.413(c)(3)(ii) to state that if “The expenses of a veteran's last illness were allowed as a medical expense deduction on the veteran's pension or parents' dependency and indemnity compensation (DIC) account during the veteran's lifetime”, then said expenses will not be deducted from a surviving spouse’s award. This change will follow current VA practice.

Subsequent to the publication of proposed § 5.413, section 509 of Public Law 112-154 (2012) amended 38 U.S.C. 1503(a) by adding new provisions which set forth in detail what casualty loss reimbursements are excludable from countable income for purposes of VA Improved Pension. We propose to include these new provisions in § 5.413(d).

We propose to move § 5.413(e), concerning the treatment of gambling losses, to § 5.410(g), because it primarily concerns counting income from gambling. Initially proposed paragraph (f) of this section is redesignated paragraph (e), accordingly. Initially proposed § 5.413(g), which is now § 5.413(f), used the term “profession”. The regulation meant a professional practice. We are now clarifying this term.

§ 5.414 Net Worth Determinations for Improved Pension

In reviewing initially proposed § 5.414, we determined that this section could be clarified by the reorganization and removal of unnecessary verbiage. We also propose

to provide more detailed explanations of when a dependent's net worth is considered and how net worth can bar Improved Pension.

In what is now paragraph (b)(1) (initially proposed paragraph (a)), we propose to add the word "primary" before residence to clarify that VA excludes from net worth only the value of the residence where the claimant or beneficiary usually lives, not the value of other properties where they may occasionally reside. A claimant or beneficiary can only have one primary residence at any given time. The term is well understood because a primary residence is considered as a legal residence for purpose of income tax and/or acquiring a mortgage. We also propose to clarify that the primary residence will not be counted as net worth simply because the veteran has moved into a nursing home.

In what is now paragraph (b)(3) (initially proposed paragraph (c)(3)), we propose to clarify that the "child educational exclusion" applies whether the child is a dependent or a claimant in his or her own right.

In § 5.414(d)(2)(i), we propose to clarify that a claimant's adjusted annual income includes the adjusted annual income of any person whose net worth is considered part of the claimant's net worth. These rules were not explicit in the initially proposed rule, but they comport with current VA practice and policy and are not inconsistent with the initially proposed rule.

In initially proposed § 5.414(d), we determined that there was a lack of criteria for determining whether net worth is a bar for benefits. To eliminate ambiguity, we propose to establish an $80,000 guideline and determined that "it is reasonable to expect that part of the claimant's net worth should be used for the claimant's living expenses" when the net worth is $80,000 or more. Having a specific dollar amount ensures uniformity and fairness of VA decision-making throughout the country. This change is consistent with current practice.

We also propose to revise § 5.414(e) for clarity.

§ 5.415 Effective Dates of Changes in Improved Pension Benefits Based on Changes in Net Worth

We had stated in § 5.415(a) that an increase in a child's net worth requires VA to reduce the payment amount of Improved Pension. However, if the child's net worth is increased, the removal of his dependency from the beneficiary's award may cause an increase in payment. Such a situation may occur when the dependent child has income and the removal of the child's dependency and his or her income causes an increase in the beneficiary's award. We propose to clarify that regardless of whether or not the removal of such child's dependency results in a higher pension rate, the effective date based on the change in net worth is the first day of the year after the year that net worth increased. This change is consistent with current practice.

§ 5.416 Persons Considered as Dependents for Improved Pension

We propose to remove the sentence, “The child need not be living with the veteran or surviving spouse to be in custody”, from initially proposed § 5.416(b)(1) because the same information is provided in what was initially proposed § 5.417(d), now the definition of “custody of a child” in proposed § 5.1. The rule is appropriately located in that definition. It is not necessary to § 5.416, which pertains to persons considered as dependents.

We also propose to change “reasonably contributes” to “provides reasonable contributions” in both paragraphs (a)(3) and (b)(2), because it is the amount of the contributions that must be reasonable, not the way that the person provides those contributions.

§ 5.417 Child Custody for purposes of Determining Dependency for Improved Pension

We propose to move the definitions of “custody” and “legal responsibility” to proposed § 5.1, defining “custody of a child”. The remainder of this regulation contains four presumptions for determining dependency. We propose to simplify the regulation to eliminate redundancy without altering its meaning.

§ 5.420 Reporting Periods for Improved Pension

In initially proposed § 5.420, we stated, “When calculating adjusted annual income, VA counts income that is anticipated or received during a specific period, called a ‘reporting period.’” We have determined that it would be helpful for readers to have a simple definition of “reporting period” so we propose to insert the following definition

(based on § 3.661, the current rule regarding income reporting): "A reporting period is a time period established by VA during which a claimant or beneficiary must report to VA all income, net worth, and adjustments to income."

We propose to revise § 5.420(a) to include that a claimant or beneficiary may report a change in income or net worth when the change occurs. The claimant or beneficiary does not have to wait until the beginning of the next reporting period to report the change. This change is consistent with current VA practice.

§ 5.422 Effective Dates of Changes to Annual Improved Pension Payment Amounts Due to a Change in Income

In paragraphs (b)(2) and (3) of initially proposed § 5.422, we used the term "required evidence" without explaining what the evidence should prove. To resolve this potential ambiguity, we propose to revise paragraph (b)(2) by replacing "required evidence" with "evidence showing the dependency". Likewise, we propose to revise (b)(3) by replacing "required evidence" with "evidence showing the loss of a dependent".

§ 5.423 Improved Pension Determinations when Expected Annual Income is Uncertain

We propose to provide a definition for "expected annual income" in the first sentence of § 5.423(a). We propose to define the term as "the annual income a claimant or beneficiary anticipates receiving during a given reporting period."

We propose to remove all references in this subpart to the term “anticipated income” and propose to replace it with “expected income”. This proposed change will be for consistency purposes.

§ 5.424 Time Limits to Establish Entitlement to Improved Pension or to Increase the Annual Improved Pension Amount Based on Income

In reviewing initially proposed § 5.424, we determined that this section can be clarified and shortened by minor reorganization and the removal of unnecessary verbiage. We propose to make these changes.

§ 5.430 Marriage Date Requirements for Improved Death Pension

Initially proposed § 5.430(a)(2)(i) referred to veterans of the Mexican Border period and World War I. We propose to remove these references because there are no longer any surviving veterans of these war periods and VA does not anticipate receiving any more Improved Death Pension claims from the surviving spouses of these deceased veterans. Moreover, if VA does receive such a claim, it could process the claim under the controlling statutes, 38 U.S.C. 103(b) and 1541(f).

We also propose to remove initially proposed § 5.430(b), which had concerned the marriage-date requirements of a surviving spouse. That paragraph was based on 38 U.S.C. 103(b), which is not limited to Improved Pension. We propose to move the rule to § 5.200, “Surviving spouse: requirement of valid marriage to veteran.”

§ 5.432 Deemed Valid Marriages and Contested Claims for Improved Death Pension

In §§ 5.432 and 5.433, we propose to delete the term "legal" as it was used in the initially proposed rule to describe a surviving spouse. Although there is no explicit definition of "legal surviving spouse" in current part 3, the term is used to denote a spouse who was legally married to the veteran at the time of the veteran's death as contrasted with a deemed valid spouse. This distinction has no legal significance in § 5.432 or § 5.433. For the same reason, we propose to delete the term "lawful" before "surviving spouse" in § 5.539.

§ 5.434 Award or Discontinuance of Award of Improved Death Pension to a Surviving Spouse Where Improved Death Pension Payments to a Child are Involved

In initially proposed § 5.434(a)(3) we stated:

> When a surviving spouse establishes eligibility for Improved Death Pension but is not entitled because his or her adjusted annual income is greater than the maximum annual pension rate or because his or her net worth bars entitlement, VA will discontinue the child's pension award effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

Consistent with current §§ 3.503(a)(9) and 3.657(b)(1), the reference to the surviving spouse at the end of § 5.434(a)(3) should refer instead to the child. We now propose to correct this error.

In addition, we propose to reorganize § 5.434(b) to improve clarity.

§ 5.435 Calculating Annual Improved Pension Amounts for a Surviving Child

In initially proposed § 5.435(a) we parenthetically defined the term "personal custodian" as "a person legally responsible for the child's support". We propose to add a definition of "custody of a child" as § 5.1. Therefore, the definition initially proposed in this section is superfluous and we propose to remove it.

B. Elections of Improved Pension; Old-Law and Section 306 Pension AL83

In a document published in the Federal Register on December 27, 2004, we proposed to publish in a new 38 CFR part 5 VA regulations governing Old-Law Pension, Section 306 Pension, and elections of Improved Pension. 69 FR 77578. The title of this proposed rulemaking was "Elections of Improved Pension: Old-Law and Section 306 Pension" (RIN: AL83). The proposed regulations were based on current regulations in 38 CFR part 3, but were revised to reflect plain English and updated to reflect current practice. We provided a 60 day comment period that ended on February 25, 2005. We received submissions from two commenters.

Terminology

We mean to add the word "Pension" after "Old-Law" and "Section 306" whenever these two pension programs are mentioned together in a single sentence. For example, "Old-Law and Section 306 Pension" will be rewritten as "Old-Law Pension and Section 306 Pension." This will help readers understand that these two pension benefits are separate and distinct programs.

For consistency purposes in describing whether particular potential sources of revenue are considered by VA in calculating a beneficiary's income or net worth, we propose to replace the word "include" with "count" (or with a commensurate substitute) and "exclude" with "does not count" (or with a commensurate substitute).

Comment Relating to a Different Portion of This Rulemaking

One commenter suggested that a rating decision that reduces a rating during a period of hospitalization should be considered void if notice of a prior rating decision had not been sent to a veteran at the veteran's latest address of record. The commenter used her husband's case as an example, stating that his 1990 reduction should be void because she alleges that VA did not provide her husband with notice of a 1971 rating decision. This comment deals with defective notice and the effect it has on the finality of decisions. Accordingly, this comment will be discussed with other comments received for RIN 2900–AL87, "General Provisions", in subpart A of this part, which contains VA's definition of a "Final decision" in proposed § 5.1.

§ 5.461 Electing Improved Pension Instead of Old-Law Pension or Section 306 Pension

In the initially proposed rule, we proposed to include § 5.461, "Electing Improved Pension instead of Old-Law or Section 306 Pension", in subpart F of part 5. However, upon further consideration, it would be more appropriate to place this regulation in subpart L, "Payments and Adjustments to Payments", along with other rules on elections of veterans benefits as § 5.758. Hence, we propose to include § 5.461 in our

proposed subpart L, initially published in the Federal Register on December 27, 2004. 69 FR 77578.

§ 5.472 Rating of Income for Old-Law Pension and Section 306 Pension

Initially proposed § 5.472(b)(2) defined "payments" as "cash and cash equivalents (such as goods and other negotiable instruments) . . . " We propose to revise our definition by replacing the term "goods" with "checks". This change is made in order to be consistent with our definition of "payments" in § 5.370(h) and § 5.531(b).

§ 5.475 Gaining or Losing a Dependent for Old-Law Pension and Section 306 Pension

For consistency purposes, we propose to revise the heading and the regulatory text in § 5.475(b)(2) by replacing "on or before December 31, 1978" with "before January 1, 1979". This change will improve clarity in the application of effective dates and is consistent with the rest of part 5.

§ 5.477 Effective Dates of Reductions and Discontinuances of Old-Law Pension and Section 306 Pension

In § 5.477(b), we propose to delete the reference to "§§ 3.500 through 3.503" from the regulatory text and replace it with a reference to § 5.705, the part 5 regulation that lists all of the part 5 regulations governing the effective dates of reductions and discontinuances. We propose to revise the regulatory text by inserting the words "appropriate" and "as specified" in order to notify readers that the provisions in § 5.705

will indicate which effective dates, other than those stated in paragraph (a), are applicable to a particular case.

§ 5.478 Time Limit to Establish Continuing Entitlement to Old-Law Pension or Section 306 Pension

We propose to revise the regulatory text in § 5.478(a), Expected income appears to exceed income limit, by inserting the phrase “for that calendar year” after “annual income limit” and inserting the word “calendar” before “year effective January 1”. These revisions will remove ambiguity and clarify that VA measures income in calendar-year units.

Deletion of Withholding Provision, Formerly Under 38 CFR 3.260(b), Computation of Income

In addition, we note that under 38 CFR 3.260(b) (the current rule upon which § 5.478(a) is based), VA has the authority to withhold payments if that income will exceed the statutory limit. However, this withholding provision only applied to new claims for Old-Law Pension and Section 306 Pension. Since such claims have been barred by statute since 1979 (see Public Law 95-588, sec. 306(a), 92 Stat. 2508 (1978)), there is no need to include the provision in part 5.

XII. Subpart G: Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary

A. Dependency and Indemnity Compensation Benefits AL89

In a document published in the Federal Register on October 21, 2005, we proposed to revise Department of Veterans Affairs (VA) regulations governing dependency and indemnity compensation (DIC) benefits, to be published in a new 38 CFR part 5. 70 FR 61326. We provided a 60-day comment period that ended December 21, 2005. We received submissions from four commenters: Disabled American Veterans, Vietnam Veterans of America, National Organization of Veterans' Advocates, and one from a member of the general public.

§ 5.500 Proof of Death

Initially proposed § 5.500 described the types of evidence VA will accept as proof of death. We propose to revise this provision to explain that, where the rule lists more than one type of evidence that VA will accept as proof of death, VA requires the first-listed type of evidence, if obtainable. If the first-listed document is not obtainable, VA will accept the next-listed type of evidence that is obtainable. This clarification reflects VA's established practice. With respect to matters that are ordinarily documented by official public records, such as death, VA's long-standing practice is to require the official records that VA considers most reliable to establish those facts, if such records are available. We believe that it is helpful to state this principle in proposed § 5.500 and we propose to revise it accordingly. In accordance with its duty to assist, VA will assist claimants as necessary in seeking to obtain the types of evidence needed to establish the fact of death.

§ 5.504 Service-connected Cause of Death

All four of the comments received concerned the provisions of initially proposed § 5.504. This proposed section defined a service-connected disability for purposes of determining entitlement to VA death benefits, and provided the rules for determining if a veteran's death is service connected. The AL89 NPRM, omitted the following sentence from 38 CFR 3.312(a), “[t]he 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.” This language is unnecessary in proposed § 5.504 because it mainly restates the generally applicable principle that VA decisions will be based on a review of the entire record. See 38 U.S.C. 5107(b) and 38 CFR 3.102. We have stated this in proposed § 5.4(b), “Claims adjudication polices”. Regarding avoiding “speculation”, we have stated this concept in proposed § 5.3(b)(6). Regarding the “exercise of sound judgment”, and conducting a “careful analysis”, these duties are inherent in any adjudication process and where a claimant disagrees with the judgment or analysis of a VA adjudicator, he or she may appeal the decision. We therefore believe it is unnecessary to include this language in our regulations.

One commenter was concerned with the provision in initially proposed § 5.504(b)(1)(ii) that states, "[f]or purposes of this section, VA will deem a sudden death in service from trauma to have been preceded by disability from the trauma." This commenter stated that the sentence we initially proposed "is unnecessarily logically convoluted and restrictive, is legally insufficient, and is in fact altogether unnecessary." He suggests as alternative language, "[f]or purposes of this section, a death in service is

service-connected [sic], provided the death was in line of duty and was not due to the servicemember's own willful misconduct."

We agree in part with the commenter's concerns. Part of this sentence is somewhat convoluted and could be read as restrictive. We propose to revise the sentence for the reasons explained in the following paragraphs.

The purpose of this sentence in the proposed rule is to preclude the interpretation that a traumatic death in service is so sudden that it does not produce a disability before death. This provision is necessary because Title 38 of the United States Code requires that to be service-connected, a death in service must result from a disability incurred or aggravated in service. "The term 'service-connected' means . . . that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service", 38 U.S.C. 101(16). For a surviving spouse or dependent to be eligible for many VA benefits due to a servicemember's death in service, the person's death must be a result of a disability "incurred or aggravated, in line of duty in the active military, naval, or air service". 38 U.S.C. 101(16); see also 38 U.S.C. 1310, 2307, 3500, and 3701.

We agree with the commenter that the sentence may be construed to be restrictive if not read carefully. This is due primarily to use of the words "trauma" and "sudden". Accordingly, we propose to remove the phrases "from trauma" and "from the trauma" and the word "sudden" in the subject sentence in proposed § 5.504(b)(1)(ii).

The revised proposed sentence now reads, "[f]or purposes of this section, VA will presume that a death that occurred in line of duty was preceded by disability." This will make clear VA's intent that the presumption applies to all deaths that occur in line of duty. We substituted "line of duty" for "in service" to reflect the requirement in 38 U.S.C. 105 and 1110 that disability must be incurred in the line of duty in order to be service connected.

Three commenters expressed concern with the provisions of initially proposed § 5.504(c), regarding service connection for the cause of death when the service-connected disability hastens death. The commenters stated that the proposed revisions in § 5.504 were more restrictive than the provisions in current 38 CFR 3.312. To avoid such a misinterpretation, we are retaining the provisions of § 3.312(c). Accordingly, we are inserting the exact wording of § 3.312(c) into proposed § 5.504(c)(2).

§ 5.510 Dependency and Indemnity Compensation – Basic Entitlement

Initially proposed § 5.510 stated that in order to be entitled to dependency and indemnity compensation a survivor of the veteran "must be otherwise qualified" for this benefit. We propose to delete the terms "otherwise qualified" and "qualified" from proposed § 5.510. To say that a survivor of a veteran must be qualified is redundant of

other VA provisions that state the requirements that must be met in order to be considered a dependent of the deceased veteran.

In proposed § 5.510(b)(2), to be consistent with the Federal Register Document Drafting Handbook, page 1-19, we propose to change the order of the references to list the United States Code first. In addition, we propose to correct the authority citation at the end of proposed § 5.510.

§ 5.511 Special Monthly Dependency and Indemnity Compensation

We propose to revise initially proposed § 5.511(a) to clarify that entitlement to this benefit is determined based on whether the surviving spouse or parent needs regular aid and attendance. Determinations of the need for aid and attendance will be made under the criteria in proposed § 5.320.

§ 5.520 Dependency and Indemnity Compensation – Time of Marriage Requirements for Surviving Spouses

We propose to revise initially proposed § 5.520(b)(1)(iii) and (b)(2)(ii) by adding the words, “was born to them” between “marriage or” and “before the marriage” in both places it appears. These changes are made to ensure that readers understand that the child VA is referring to is a child of a veteran and spouse, not a veteran’s stepchild. This is the same wording used in part 3.

In the NPRM to this rulemaking we stated that "Proposed § 5.520 is based on portions of current § 3.54 and applicable statutory provisions. . ." However, it is also based on § 3.22(d), which is substantially the same as § 3.54.

§§ 5.521 Dependency and Indemnity Compensation Benefits for Survivors of Certain Veterans Rated Totally Disabled at Time of Death, and 5.523 Dependency and Indemnity Compensation Rate for a Surviving Spouse

In the NPRM, we reserved §§ 5.521 and 5.523 as the eventual locations for rules concerning entitlement to DIC for survivors of certain veterans rated totally disabled at the time of death and concerning the rates of DIC payments to surviving spouses. We explained that, when the NPRM was issued, rulemaking was pending to amend the provisions in part 3, Code of Federal Regulations, involving those matters, and that we would incorporate those part 3 provisions in this final rule once the pending part 3 changes were made. Because those part 3 changes have now been made, as explained below, we propose to add the corresponding provisions in part 5.

VA issued a final rule in December 2005 amending its part 3 regulations in response to the decision in Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 314 F.3d 1373 (Fed. Cir. 2003). This final rule (see 70 FR 72211, Dec. 2, 2005) revised § 3.22(b) to clarify the meaning of the phrase "entitled to receive" for purposes of determining whether a veteran's survivors are entitled to benefits under 38 U.S.C. 1318, "Benefits for survivors of certain veterans rated totally disabled at time of death".

This final rule also revised provisions previously in § 3.5(e) relating to the rates of DIC payable to surviving spouses and moved those provisions into § 3.10.

VA completed another rulemaking in 2006, implementing section 301 of the Veterans Benefits Improvement Act of 2004. Section 301 amended 38 U.S.C. 1311, Dependency and indemnity compensation to a surviving spouse, by adding subsection (e) (amended to be subsection (f) by section 4 of Public Law 109-361, 120 Stat. 2062 (2006)), providing a $250 increase in the monthly rate of DIC to which a surviving spouse with one or more children below age 18 is entitled. The increased rate is payable for the 2-year period beginning on the date entitlement to DIC began and ends the first month after the month all children of the surviving spouse attain age 18. This statutory change was incorporated as § 3.10(e)(4). See 71 FR 44915, Aug. 8, 2006.

In anticipation of these regulatory changes, VA reserved §§ 5.521 and 5.523 in the NPRM for this regulation rewrite segment. We propose to incorporate the current versions of §§ 3.22 and 3.10 (as amended), as proposed §§ 5.521 and 5.523, respectively. In addition, we propose to remove the reference to, "§ 5.521 (Reserved) and § 5.523 (Reserved)". As noted in the NPRM and this proposed notice, the provisions of current § 3.22(d) are incorporated in proposed § 5.520 and the provisions of current § 3.22(e) and (f) are incorporated in proposed § 5.522(a), (b), and (c)(4).

Current 38 CFR 3.22(a)(2)(iii) implements 38 U.S.C. 1318(b)(3) which states that VA will pay death benefits to the surviving spouse or children in the same manner as if

the veteran's death were service-connected if the veteran's death was not the result of his or her own willful misconduct and at the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of not less than 1 year immediately preceding death, if the veteran was a former prisoner of war who died after September 30, 1999. Section 603 of Public Law 111-275, 124 Stat. 2864, 2885 (2010) amended section 1318(b)(3) by removing the requirement that the veteran have died after September 30, 1999, so we have omitted this requirement from § 5.521(a)(2)(iii).

§ 5.524 Awards of Dependency and Indemnity Compensation Benefits to Children When There is a Retroactive Award to a Schoolchild

We propose to make changes to initially proposed § 5.524 to reduce wordiness and enhance clarity. For example, paragraph (a), as initially proposed, stated: "The total amount payable to the children, which varies according to the number of children, is divided and paid to the children in equal shares." We propose to revise that sentence to state: "The total amount VA pays to a child depends on the number of children, and the amount is paid to each child in equal shares." Further, we propose to add the term "currently" to paragraph (a)(1) to clarify that the exception stated in proposed § 5.524 only applies when, at the time DIC is reestablished for the additional child, other children are receiving running DIC awards.

We propose to delete the term "eligible" as it applies to child in proposed § 5.524. To state that dependency and indemnity compensation is payable to an eligible child is

redundant of other VA regulations that state the requirements of a dependent. For this same reason, we propose to make similar changes in proposed § 5.536 to the term "eligible parents".

We additionally propose to reword paragraphs (a)(2) and (3) to enhance reader comprehension. The rewording of proposed § 5.524(a) will make this regulation more comprehensible to the average reader.

Proposed § 5.524(b) deals with retroactive payments and payment dates for additional children who successfully reestablish DIC entitlement. Upon further review, we determined that rewording the paragraph would make it easier to understand. We intend no change in the meaning of paragraph (b).

§ 5.525 Awards of Dependency and Indemnity Compensation When Not All Dependents Apply

In NPRM AM06, "Payments and Adjustments to Payments"; 73 FR 65212, Oct. 31, 2008, we included proposed § 5.696, "Awards of dependency and indemnity compensation when not all dependents apply". In preparing this proposed rule, we have determined that because it concerns only dependency and indemnity compensation benefits, this section more logically belongs in part 5, subpart G, which is titled, "Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary". We therefore propose to move this section into subpart G, renumbering it as proposed § 5.525.

§ 5.530 Eligibility for, and Payment of, a Parent's Dependency and Indemnity Compensation

We propose to correct the authority citation at the end of initially proposed § 5.530 so that the United States Code sections are in chronological order.

5.533 Income not counted for parent's dependency and indemnity compensation

In the preamble for initially proposed § 5.302, 70 FR 61326, 61336, (Oct. 21, 2005), we explained our omission of the first sentence of § 3.262(j)(2) as an unnecessary specific instance of a broader general rule in 5.302(a) that encompasses the specific rule. The second sentence of § 3.262(e) is analogous to § 3.262(j)(2) and unnecessary for the same reason. The preamble to initially proposed explained our omission of the third sentence of § 3.262(e)(4). Without the third sentence, the fourth sentence is moot without the third sentence, because it provides a process to implement after implementing the third sentence.

§ 5.535 Adjustments to a Parent's Dependency and Indemnity Compensation When Income Changes

In reviewing the AL89 NPRM, we determined that we failed to incorporate § 3.660(b)(2) in initially proposed § 5.535. The concept of anticipated income is different from that of actual income. This is because a beneficiary's actual income may be less than his anticipated income. VA may learn of this in any of the following ways:

1) Actual income is reported by the parent on an eligibility verification report (EVR); 2) VA requests a statement from the parent of their actual income at anytime; or 3) The parent notifies VA of income changes on their own.

We therefore propose to insert the rules from § 3.660(b)(2) into proposed § 5.535.

§ 5.536 Parent's Dependency and Indemnity Compensation Rates

In initially proposed § 5.536(d) we intended only to restate current § 3.251(a)(4), but we inadvertently misstated that provision. Section 3.251(a)(4) does not purport to apply only if there is one eligible parent. Instead, it states that if a parent's remarriage ends, the parent will be paid at the rate for one parent alone or for two parents not living together, whichever is applicable. This means that the parent will be paid at the "one parent" rate if there is no other eligible parent, or at the "two parents not living together rate" if the other parent is alive. Initially proposed § 5.536(d) limited this rule to cases where there is only one parent and stated that VA will pay at the "one parent" rate if the remarriage ends or at the "two parents not living together" rate if the parent is separated from his or her spouse. We propose to revise initially proposed paragraph (d) so that it is now consistent with § 3.251(a)(4).

Note Regarding § 5.573 through § 5.579.

In the NPRM for AL89, we included §§ 5.573 through 5.579. We received no comments on these sections. To cut down on the length of this rulemaking, we chose

to include those sections in the rule segment to the companion rulemaking, RIN 2900-AL71, Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary, published as NPRM at 69 FR 59071, Oct. 1, 2004. Any technical corrections or changes in terminology made to these regulations are included there. Thus initially proposed §§ 5.573 and 5.574 have been removed from this proposed subpart, as well as the reference to reserving proposed §§ 5.575-5.579.

Technical Corrections and Changes in Terminology

The changes in terminology in this proposed rulemaking are made primarily for purpose of achieving consistency throughout our part 5 regulations. Except as otherwise provided in this preamble, no substantive changes are intended by these changes made in terminology.

According to paragraph 12.9 of the Government Printing Office Style Manual, numerals rather than words are used when referring to units of measurement and time. Therefore, we substituted the numeral “7” for the word “seven” in proposed § 5.503(b). Likewise, we substituted the numeral “1” for the word “one” in proposed § 5.520(b)(1)(ii) and (b)(2)(i).

To be consistent in style with the rest of part 5, we propose to change “DIC” to “dependency and indemnity compensation” if it was used in a heading to a regulation section in the NPRM. We also propose to change the headings in proposed §§ 5.521 and 5.535 accordingly. Similarly, "dependency and indemnity compensation" was

changed to "dependency and indemnity compensation (DIC)" the first time it appears in each section, if we did not do so in the NPRM. We propose to make this change in proposed § 5.531(c) and the introductory paragraph to proposed § 5.533. Likewise, we propose to change "dependency and indemnity compensation" to "DIC" the second and subsequent times it appeared in each section, if we had not already done so in the NPRM. We propose to make such changes to proposed § 5.523(a) and (e)(4).

To clarify that only one parent is required to apply for DIC, not both, we propose to change the heading of the undesignated center heading entitled, "Dependency and Indemnity Compensation – Eligibility Requirements and Payment Rules for Parents," to, "Dependency and Indemnity Compensation – Eligibility Requirements and Payment Rules for a Parent". Also, where appropriate to make this requirement more apparent, we propose to change references from "parents" to "a parent," except where the context clearly encompasses both parents or all parents in receipt of DIC.

To be consistent with other regulations in part 5, we propose to change the phrases, "[t]he amount to be offset includes" and "[t]he amount to be offset excludes" to "VA will count in the amount to be offset" and "VA will not count in the amount to be offset" in each place they appeared in the NPRM in initially proposed § 5.522(c)(1) through (4). For the same reason, in (c)(1) we propose to change “excluded” to “not counted”, in (c)(2) we changed “[t]his includes” to “VA will also count”, and in (c)(3) we changed “included” to “counted”. Similarly, in § 5.531(a) and (b), we propose to change the word "included" to the phrase or word, "are counted" or "counted", as appropriate.

Finally, we propose to change the heading of initially proposed § 5.533 from “Exclusions from income” to “Income not counted for parent’s dependency and indemnity compensation,” and in initially proposed § 5.533(i)(2), we propose to change the phrase, "be excluded" to "not be counted.”

B. Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary AL71

In a document published in the Federal Register on October 1, 2004, we proposed to revise Department of Veterans Affairs (VA) regulations governing accrued benefits and special rules applicable upon death of a beneficiary, to be published in a new 38 CFR part 5. 69 FR 59072. We provided a 60-day comment period that ended November 30, 2004. We received submissions from two commenters: Vietnam Veterans of America and a member of the general public.

§ 5.538 Effective Date of Dependency and Indemnity Compensation Award

In initially proposed AL71, we placed all the dependency and indemnity compensation (DIC) effective date provisions at the end of subpart G, “Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary”. We have determined that they will be easier to locate if they appear after the series of regulations on DIC, rather than after the series of regulations on accrued benefits. Therefore, we propose to renumber the sections initially proposed as §§ 5.567 through 5.574 as §§ 5.538 through 5.545.

We propose to revise initially proposed § 5.538 to identify dates as "effective dates" instead of "payment dates" to be consistent with other provisions in part 5.

In § 5.538(a)(1)(i), we propose to change the phrase, "If VA receives a claim for [DIC] within one year from" to "If VA grants DIC based on a claim received no later than 1 year after". In proposing this rule, we incorrectly omitted the relevant event of VA granting the benefit. In addition, because VA considers a claim for death pension to also be a claim for DIC, it could be misleading to imply that the claim must be for DIC. For the same reasons, we propose to make conforming changes to paragraphs (a)(2), (b)(1), (b)(2), (d)(1), and (d)(2) of § 5.538.

In § 5.538(a)(1)(ii), we propose to add the words, "based on a report of actual death" to be consistent with current § 3.400(c)(1), the part 3 equivalent to this section, and to correct an omission from the initially proposed rule. We also propose to add the words, "any of the veteran's following military entitlements" and reformat the sentence. This revision will ensure that there is no confusion between military entitlements and other benefits titled allowances, allotments, or service pay.

In § 5.538(d)(2), we propose to change cross-references to §§ 5.230 and 5.696 to exceptions, in order to be as specific as possible and eliminate confusion. We begin the proposed rule by stating "Except as otherwise provided in this part" and end with the cross-references in an attempt to imply that the cross-references are the exceptions.

In § 5.538(e), we propose to add § 5.230 as an exception to correct an omission from the initially proposed rule.

§ 5.539 Discontinuance of Dependency and Indemnity Compensation to a Person No Longer Recognized as the Veteran's Surviving Spouse

In § 5.539 (initially proposed 5.568), we propose to revise paragraph (a) so that it clearly requires the discontinuance of DIC payments to a former payee when VA recognizes that a new payee is eligible for DIC based on the same veteran. In the initially proposed rule, we inadvertently addressed the effective date of such discontinuance without also directing that such discontinuance occur.

We propose to delete from paragraph (b) language referring to periods on or after December 1, 1962. Because part 5 will apply only prospectively, not retroactively, the language is unnecessary.

We also propose to revise the language in paragraph (b)(1) that had stated that "the award to the former payee will be terminated the day preceding the effective date of the award to the new payee" to state instead that "the award to the former payee will be discontinued on the effective date of the new payee's DIC award". We propose to revise the language to conform to our practice in part 5 of referring to the first date that a new rate or benefit is paid, instead of referring to the last date on which a prior rate or benefit is paid.

We propose to delete paragraph (b)(3), which had contained an exception to the effective-date provisions when the discontinuance of DIC payments is due to a change in, or in the interpretation of, the law or an administrative issue, from this regulation. That provision was redundant of § 5.152, which was published as proposed on May 22, 2007. See 72 FR 28769.

§ 5.540 Effective Date and Payment Adjustment Rules for Award or Discontinuance of Dependency and Indemnity Compensation to a Surviving Spouse Where Payments to a Child are Involved

In § 5.540 (initially proposed 5.569), We propose to reorganize this section for clarity by incorporating much of the introductory material initially proposed in paragraph (a) into the paragraphs that follow. This revision simplifies the section without changing the meaning or intent.

§ 5.541 Effective Date of Reduction of a Surviving Spouse's Dependency and Indemnity Compensation Due to Recertification of Pay Grade

In § 5.541, (initially proposed 5.570), we propose to delete paragraphs (a) and (b) because those paragraphs were redundant of §§ 5.197, "Effective date of reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation due to marriage or remarriage", and 5.231, "Effective date of reduction or discontinuance: child reaches age 18 or 23", which were published as proposed on September 20, 2006. 71 FR 55052, 55067, 55073. We also propose to change the title of the regulation to accurately describe the revised content.

One commenter suggested that VA should add language to § 5.541 (initially proposed § 5.570(c)) to inform readers that the reduction of DIC based on recertification of a pay grade to a level lower than the one originally certified would not result in an overpayment of monthly DIC benefits paid to a veteran's survivors based on the pay grade previously in effect. We did not include such language in the initially proposed rule because a reduction under § 5.541 will always involve a future and not a retroactive adjustment in DIC benefit payments. No overpayment is created because of the prospective nature of the reduction. However, we propose to reword the provision to clarify that the reduction will be "effective the first day of the month after the month for which VA last paid the greater benefit".

§ 5.542 Effective Date of an Award or an Increased Rate Based on Decreased Income: Parents' Dependency and Indemnity Compensation

In initially proposed § 5.571(c), we referred to time limits contained in a "regulation that [would] be published in a future Notice of Proposed Rulemaking" based on current § 3.660(b)(1). That regulation, § 5.535, was published as proposed on October 21, 2005. See 70 FR 61326. To simplify the material and eliminate redundancy, we propose to combine proposed §§ 5.535 and 5.571 into a single section, § 5.542.

§ 5.543 Effective Date of Reduction or Discontinuance Based on Increased Income: Parents' Dependency and Indemnity Compensation

In proposed § 5.543 (initially proposed 5.572), we propose to reorganize the material into two paragraphs instead of four to simplify the structure of the regulation. Also, we propose to change the language in initially proposed paragraph (b) stating that a reduction or discontinuance would be effective at "the end of the month in which income increased" to refer instead to "the first day of the month after the month in which the income increased or is expected to increase". We propose to revise the language to conform with our practice in part 5 of referring to the first date a new rate is paid instead of referring to the last date on which a prior rate is paid.

§§ 5.544 Dependency and Indemnity Compensation Rate Adjustments when an Additional Survivor Files a Claim, and 5.545 Effective Dates of Awards and Discontinuances of Special Monthly Dependency and Indemnity Compensation

When these initially proposed rules were published in the Federal Register on October 1, 2004, we proposed to reserve §§ 5.573 and 5.574 for future regulations. 69 FR 59072. In the second package of proposed rules for this subpart G published on October 21, 2005, we designated § 5.573 as "Effective date of dependency and indemnity compensation rate adjustments when an additional survivor files an application", and § 5.574 as "Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation." 70 FR 61326, 61348. We received no comments regarding these two sections. As discussed above, we propose to renumber the sections, initially proposed as §§ 5.573 and 5.574, as §§ 5.544 and 5.545 respectively.

We propose to move the exception (stated in initially proposed § 5.573(e)) referring to § 5.524 to the introductory paragraph of § 5.544. This prominent position will more effectively alert readers to the exception.

Also in § 5.544, we propose to delete paragraph (a)(2) and reorganize the remainder of paragraph (a) into a single paragraph. The condition contained in initially proposed paragraph (a)(2)—that payment to the additional survivor would reduce the benefit being paid to the other survivors—is always true when the benefit is DIC; therefore, stating it as a condition is unnecessary in proposed § 5.544. The language proposed in paragraph (a)(2) is derived from current § 3.650(a) and is necessary in that section because it applies to pension and compensation as well as DIC.

In § 5.545(a)(2), we propose to delete the word "basic" from before "DIC". Part 5 will not use the term "basic DIC" to distinguish DIC from special monthly DIC because use of the term "basic DIC", which is not used elsewhere in part 5, was likely to confuse a reader. Instead, we will distinguish the benefits by referring to "DIC" and "special monthly DIC". We also propose to simplify the paragraph by eliminating initially proposed paragraph (a)(2)(i). Initially proposed paragraph (a)(2) provided that the effective date would be "the later of the following dates: (i) [t]he effective date of the . . . DIC award, or (ii) [t]he date entitlement to special monthly DIC arose." Unless the two dates are the same, the date entitlement to special monthly DIC arose will always be the later date, so it is unnecessary to refer to the effective date of the DIC award.

We propose to redesignate initially proposed § 5.574(a)(3), which was based on current § 3.402(c)(2) and the last sentence of § 3.404, as a new paragraph § 5.545(c). We have also reworded the paragraph in order to specify that special monthly dependency and indemnity compensation based on the need for aid and attendance will not be paid if the surviving parent or surviving spouse is receiving hospital care in his or her own right as a veteran. The rewording of this paragraph is made for clarity.

Changes from Proposed §§ 5.550 Through 5.559 Based upon a Change in the Implementation of Part 5

When we began writing part 5, we planned to remove part 3 from title 38, CFR, such that all claims for benefits, and the administration of such benefits, would be governed by part 5. Accordingly, many of the part 5 regulations were written and proposed with that concept in mind. Since then, we determined that it would be better to retain the part 3 regulations for the adjudication of claims received before the applicability date of the part 5 regulations. Thus, we would apply the part 5 regulations only to claims received on or after the applicability date of the part 5 regulations.

Specifically, when we initially proposed the accrued-benefits regulations, we anticipated that they would apply to all claims, including those filed before December 16, 2003, and those in which death of the beneficiary occurred before December 16, 2003. The proposed rules distinguished claims for accrued benefits filed before December 16, 2003, from claims for accrued benefits filed on or after that date. The rules also contained effective dates relevant to the distinction between claims filed

before versus after December 16, 2003. We received comments concerning the substance of these issues, but these comments are no longer relevant because we have removed the provisions.

Part 5 will not be in effect before 2013. A claim for accrued benefits must be filed no later than 1 year after the date of the beneficiary's death. Therefore, part 5 will not apply to claims for accrued benefits based on a death before 2004. We propose to revise the rules accordingly.

For the above reason, we propose to revise the definition of "accrued benefits" (initially proposed in § 5.550, now in proposed § 5.1) and delete initially proposed §§ 5.556, 5.558, and 5.559. As discussed further below, we also propose to delete initially proposed § 5.554. Because we are proposing to delete initially proposed §§ 5.554 and 5.556, we propose to renumber proposed § 5.555 as § 5.554, and proposed § 5.557 as § 5.555. We propose to reserve §§ 5.556, 5.557, 5.558, and 5.559.

One comment pertained to initially proposed § 5.556 and its 2-year limitation on the payment of accrued benefits on cases in which the beneficiary had died before December 16, 2003. The commenter explained that she was a surviving spouse receiving dependency and indemnity compensation under 38 U.S.C. 1151 because of a death caused by VA medical treatment and that the veteran had been receiving VA disability compensation during his lifetime. The commenter felt that where VA medical care had hastened a veteran's death so that the veteran did not live until December 16,

2003, VA should pay the full amount of accrued benefits without regard to the 2-year limitation. The Veterans Benefits Act of 2003, Public Law 108-183, sec. 104, 117 Stat. 2651, 2657, was signed into law on December 16, 2003, and removed the 2-year limitation on payment of accrued benefits with respect to deaths occurring on or after that date. See 38 U.S.C. 5121. VA has no authority to pay more than 2 years of accrued benefits for deaths occurring before December 16, 2003. We propose to make no changes based on this comment because we do not have the authority to change the regulations as the commenter wants. However, as discussed above, we propose to delete initially proposed § 5.556 because it was intended to apply only to claims based upon the death of a beneficiary occurring before December 16, 2003.

§ 5.550 [Reserved]

In § 5.550, we initially proposed several definitions. We have determined that the definitions are either unnecessary or more appropriately placed elsewhere in part 5. So we propose to delete the initially proposed text and reserve § 5.550.

We propose to move the definition of “accrued benefits” to § 5.1, the definition of “claim for benefits pending on the date of death” to § 5.1, and the definition of “evidence in the file on the date of death” to § 5.1 because these definitions apply to all of part 5.

We initially proposed a definition of “deceased beneficiary” to distinguish that person from the living beneficiary claiming survivor’s benefits. See 69 FR 59076, Oct. 1, 2004. We have since concluded that the definition is superfluous because it adds

nothing to the plain meaning of the term “deceased beneficiary”. Where the regulations refer to a “deceased beneficiary”, the term is clear in context.

The initially proposed definitions of “child” and “dependent parent” contained references to the general definitions of those terms (contained elsewhere in part 5) and rules limiting the application of the general definitions for purposes of accrued benefits. The references to the general definitions are unnecessary, and the rules limiting the definitions are more appropriately placed in § 5.551(a). We therefore propose to revise the rule limiting the definition of “child” to more accurately reflect the content of current § 3.1000(d)(2) upon which the rule is based.

Similarly, the initially proposed definition of “surviving spouse” contained a reference to the general definition contained elsewhere in part 5 and a rule limiting the application of the general definition for purposes of accrued benefits. The reference to the general definition is unnecessary, and the rule limiting the definition is more appropriately placed in §§ 5.551(b) and 5.566(d)(1). In relocating the rule, we propose to not repeat the language contained in initially proposed § 5.550(h)(2)(i) regarding date-of-marriage requirements for DIC and death compensation. Although initially proposed § 5.550(h)(2)(i) was based on a reference to date-of-marriage requirements in § 3.1000(d)(1), a surviving spouse could never claim accrued benefits based on DIC, so the language was superfluous.

As stated in the preamble of the AL71 NPRM, the U.S. Court of Appeals for Veterans Claims in Bonny v. Principi, 16 Vet. App. 504 (2002) interpreted 38 U.S.C. 5121(a) as establishing a class of benefits known as "benefits awarded, but unpaid at death". 69 FR 59072, 59074, Oct. 1, 2004. Although we initially proposed to define "benefits awarded, but unpaid at death" in proposed § 5.550, we have determined that it is unnecessary to include rules on such benefits in part 5. As stated in the preamble to RIN 2900-AL71, "These proposed rules also apply to claims for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending on December 16, 2003." Any claim pending on that date would be processed under part 3, not part 5, so there is no need to include such provisions in part 5. We therefore propose to remove all references to "benefits awarded, but unpaid at death" from part 5.

§ 5.551 Persons Entitled to Accrued Benefits

In § 5.551(c)(2) and (d)(1), we propose to add the sentence, "[i]f there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section." We propose to add this sentence for consistency with paragraphs § 5.551(e)(1) and (f) and to ensure proper disposition of the accrued benefits.

We propose to clarify initially proposed § 5.551(e), now redesignated as paragraph (f). Title 38 CFR 3.1000(a)(5) uses the phrase "last sickness or burial" instead of "last sickness and burial". However, in initially proposed § 5.551(e), we used the phrase "last illness and/or burial" without providing an explanation for this change.

Title 38 U.S.C. 5121(a)(6) states, “accrued benefits may be paid. . . to reimburse the person who bore the expense of last sickness and burial.” VA interprets the word “and” as used in the statute to mean “or”. We do not believe that Congress intended to require that a person have paid expenses of both the last illness and burial in order to qualify for some reimbursement. For example, if a person expended their savings paying for health care bills resulting from the veteran’s last illness and therefore could not pay for the burial, it would be unfair not to reimburse them for the health care bills. We are changing the initially proposed language from “and/or” to simply “or” because this term includes “and”. For this same reason, we are making similar changes in proposed §§ 5.566(d)(4), and 5.567(a)(4).

We propose to clarify § 5.551(g) to reflect VA’s long-standing policy that if a preferred potential claimant fails to file a claim, VA will not pay his or her share of accrued benefits to a person having an equal or lower preference. Similarly, if a preferred potential claimant waives rights to accrued benefits, VA will not pay his or her share of accrued benefits to a person having an equal or lower preference. VA will only pay the accrued benefits to someone else if, within the 1-year period to file a claim for accrued benefits, the preferred potential claimant dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, the next-in-line (or equal) person must file a timely claim.

The statute, 38 U.S.C. 5121, authorizes VA to pay accrued benefits only to “the living person first listed” in the hierarchy set forth in section 5121(a)(2). VA has

consistently interpreted “the living person first listed” as an instruction to pay only that person, so long as he or she is alive. Because a claim for accrued benefits may be filed up to 1 year after the veteran’s death, however, we permit a claimant lower in the hierarchy to file a claim if the person above them dies during that 1 year. We also liberally interpret the statute to authorize payment of accrued benefits to a person lower in the hierarchy when the person(s) above them is involuntarily disqualified, not withstanding that the person is still alive because, as a legal matter, such person is treated as if he or she were dead for purposes of determining entitlement to benefits.

We propose to make similar revisions to § 5.566(e)(3) based on VA’s consistent interpretation of “the following persons living at the time of settlement, and in the order named” as used in the authorizing statute, 38 U.S.C. 5502(d).

§ 5.552 Claims for Accrued Benefits

In initially proposed § 5.552(a), we noted that § 5.552 did not apply to claims for the proceeds of a benefit check that the deceased beneficiary did not negotiate before death or to awards under the Nehmer court orders for disability or death caused by a condition presumptively associated with herbicide exposure. These scope provisions are unnecessary because they are redundant of material contained in §§ 5.564, “Cancellation of checks mailed to deceased payee; payment of such funds as accrued benefits”, and 5.592, “Awards under Nehmer Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.” We therefore propose to delete § 5.552(a) and redesignate the other paragraphs accordingly.

We also propose to delete the cross reference to § 3.152(b) that was contained in initially proposed § 5.552(c)(3). Cross-referencing § 3.152, or its part 5 counterpart, § 5.52, would not be useful to the reader. The portions of those regulations pertinent to claims for accrued benefits are incorporated in § 5.552(b).

Deletion of Proposed § 5.554

We propose to delete initially proposed § 5.554. First, we propose to move the material from initially proposed § 5.554 concerning school vacation periods to § 5.551(a)(1)(ii). We propose to revise the provision to more clearly and simply state the rule.

We propose to eliminate the provision in the initially proposed rule which stated that "school confirmation of evidence of school attendance is not required to support a claim". This provision was intended to prevent VA employees from requiring proof of school attendance in claims for accrued benefits where such evidence was already of record. This might occur, for example, when the child was already listed as a dependent on the veteran's award or was receiving educational benefits under 38 U.S.C. chapter 35. There are no similar provisions regarding other types of proof in claims for accrued benefits, and it is unnecessary to have a regulation instructing VA employees to refrain from requesting duplicate evidence.

§ 5.554 VA Benefits Payable as Accrued Benefits

We propose to revise the heading of § 5.554 (initially proposed as § 5.555) so that it is no longer phrased as a question, and so that it more completely identifies the subject matter of the section.

In § 5.554(a)(10), we propose to correct the citation to 10 U.S.C. chapter 1606 (as initially proposed, it was "10 U.S.C. 1606"), and we propose to add veterans' educational assistance under 10 U.S.C. chapter 1607 to the list of potentially qualifying benefits. Section 527 of Public Law 108-375 established an additional educational assistance program, educational assistance for certain reserve component members who performed active military service under the provisions of 10 U.S.C. chapter 1607. See 118 Stat. 1811, 1890-94 (2004). This new program results in periodic monthly benefits that are paid under laws administered by the Secretary.

§ 5.555 Relationship Between Accrued-benefits Claims and Claims Filed by the Deceased Beneficiary.

We propose to revise paragraph (a) of this renumbered section (initially proposed as § 5.557) to clarify the distinction between, and relationship of, accrued-benefits claims and claims filed by the deceased beneficiary.

§§ 5.560–5.563 [Reserved]

We propose to delete the initially proposed rules concerning death compensation (proposed §§ 5.560 through 5.562) and reserve §§ 5.560 through 5.562 for later use. There are fewer than 300 beneficiaries currently receiving death compensation. VA has

not received a claim for death compensation in over 10 years, and we do not expect to receive any more claims. However, should VA receive such a claim, it could process the claim under the controlling statute, 38 U.S.C. 1121 (for survivors of wartime veterans) or 1141 (for survivors of peacetime veterans). Except for one small group of beneficiaries, death compensation is payable only if the veteran died before January 1, 1957. Because of the small number of beneficiaries of death compensation, the provisions concerning death compensation do not need to be carried forward to part 5.

Additionally, we have determined that the rule initially proposed as § 5.563, "Special rules when a beneficiary dies while receiving apportioned benefits", relates to apportionments more than to accrued benefits so we propose to move it to subpart M, "Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries". We propose to reserve § 5.563 for later use.

§ 5.564 Cancellation of Checks Mailed to a Deceased Payee; Payment of Such Funds as Accrued Benefits

Under 38 U.S.C. 5122, VA must pay, in accordance with the hierarchy of payments of accrued benefits, the amount of benefits represented in a "check received by a payee in payment of accrued benefits . . . if the payee died on or after the last day of the period covered by the check." In addition, VA may pay such benefits if the check was wrongly negotiated, but the funds are recovered. In all other cases, 38 U.S.C. 5121(c) would apply, such that a person wishing to receive accrued benefits must file a claim for such benefits.

We propose to revise the title and paragraph (a) of § 5.564. First, we propose to clarify that VA is only authorized to pay the accrued benefits represented in a check mailed to a deceased payee for a period during which the payee was alive up to at least the last day of the period. As initially proposed, the regulation stated that it did not apply to benefits for "the month in which the beneficiary died", but did not clearly identify the periods to which the regulation could apply. Moreover, this language was not technically correct, because a payee could die on the last day of the period and still be covered by the statute, which explicitly applies when the payee died "on . . . the last day of the period."

Second, we propose to clarify that this regulation may apply to multiple checks received by the deceased payee. This is clear in the current rule, 38 CFR 3.1003(a)(1), but was not clear in § 5.564 as initially proposed.

Third, the initially proposed rule referred several times to "non-negotiated" checks, which could have been read to be unnecessarily limiting because VA may also pay funds that are recovered after a check was negotiated by someone other than the payee. (In the one remaining instance, we use the term "unnegotiated" instead of "non-negotiated" to be consistent with prior opinions by VA's Office of General Counsel. See, for example, VA General Counsel's Opinion, VAOPGCPREC 8-96, 61 FR 66749 (Sept. 26, 1996).

Finally, we propose to move initially proposed paragraph (d), concerning payment to the deceased payee's estate, into paragraph (a), for organizational reasons.

As revised, paragraph (a) will more closely track the statutory language and accurately represent the current rule in 38 CFR 3.1003; it will not represent a departure from VA's current practice and interpretation of 38 U.S.C. 5122.

We also propose to delete initially proposed paragraph (b) and redesignate the remaining paragraphs accordingly. As initially proposed, paragraph (b) was comprised of two unnecessary negative propositions, based on current § 3.1003(a)(1). First, proposed paragraph (b) provided that there is no limit on the retroactive period for which payment of the amount represented by the checks may be made. It is unnecessary to state this negative proposition, and this language might mislead readers into believing that there is an unstated time limit on the retroactive period of an award under other sections, when in fact there is no such time limit. Second, proposed paragraph (b) provided that there is no time limit for filing a claim to obtain the proceeds of the checks or for furnishing evidence to perfect a claim. It is unnecessary to state this negative proposition (that is, that there is no deadline) because this language might mislead readers into believing that there is a requirement to file a claim for the proceeds of VA checks under § 5.564, when in fact there is no such requirement.

§ 5.565 Special Rules for Payment of VA Benefits on Deposit in a Special Deposit Account when a Payee Living in a Foreign Country Dies

In § 5.565(b)(1) and (2), we propose to add the words “in equal shares” at the end of each paragraph, to clarify that payment to the children of the veteran or children of the surviving spouse is to be in equal shares. The authorizing statute, 31 U.S.C. 3330, is not specific in this regard, but payment in equal shares is consistent with VA practice and provides a simple and fair rule for administering payments.

Current § 3.1008, on which initially proposed § 5.565 was based, contains no statutory authority. In our initially proposed rule, we listed 31 U.S.C. 3329 and 3330 and 38 U.S.C. 6104 as the authority citations. In reviewing this rule, we have determined that section 6104 does not provide statutory authority for § 5.565 and that additional authority is provided by 38 U.S.C. 5309. We propose to correct this authority citation appropriately.

§ 5.566 Special Rules for Payment of Gratuitous VA Benefits Deposited in a Personal Funds of Patients Account when an Incompetent Veteran Dies

We propose to clarify § 5.566(d)(3) by adding “on the date of the veteran’s death”. Similar language is contained in current § 3.1009(a)(3) upon which the initially proposed rule was based, and the phrase should have been included in the proposed rule.

Paragraph 7 of VA General Counsel’s opinion VAOPGCPREC 06-91, 56 FR 25156 (June 3, 1991), states that:

7. Interim Issue (CONTR-169), dated January 13, 1960, providing necessary instructions for the fiscal implementation of PL 86-146, provides in paragraph D.3 in pertinent part:

"a. Immediately upon death of a veteran who has been adjudged or rated incompetent, the balance in the Personal Funds of Patients account will be analyzed to determine the source thereof, i.e., funds derived from gratuitous benefits deposited by the VA under laws administered by the VA or from other sources. For this purpose gratuitous benefits are defined as all benefit payments under laws administered by the VA except insurance payments (Servicemen's Indemnity benefits are not insurance payments)."

We therefore propose to replace "gratuitous benefits" with the phrase "all benefits except insurance payments" in § 5.556. For this same reason, we propose to make this change throughout part 5.

§§ 5.567 Special Rules for Payment of Old-Law Pension when a Hospitalized Competent Veteran Dies, and 5.568 Non-payment of Certain Benefits upon Death of an Incompetent Veteran

In the initially proposed rule for subpart G, we did not include the provisions from part 3 concerning payment of Old-Law Pension benefits withheld from hospitalized competent and incompetent veterans who die before payment is made, as found in §§ 3.1001 and 3.1007. This omission was inadvertent and we now propose to include these provisions as §§ 5.567 and 5.568.

In § 5.567(b), we are not including language equivalent to current § 3.1001(b)(1) stating, "[t]here is no time limit on the retroactive period of an award". It is unnecessary to state this negative proposition, and this language might mislead readers into

believing that there is an unstated time limit on the retroactive period of an award under other sections when there is no such time limit.

Current § 3.1007 states that, "The term 'dies before payment' includes cases in which a check was issued and the veteran died before negotiating the check". Although there is no such provision in § 3.1001, VA's practice has been to apply this principle to that section as well. This is reflected by the fact that payments under both §§ 3.1001 and 3.1007 are excluded from VA's general rule on unnegotiated checks. See 38 CFR 3.1003(c). We therefore propose to add paragraph (d) to § 5.567 stating that the rule applies to "cases in which a check was issued and the veteran died before negotiating the check."

Changes in Terminology

We propose to make several changes to the wording throughout this portion of the regulations. For example, we propose to change both "prior to" and "preceding" to "before", and we propose to change "prior" to "previous".

We propose to change "day following the date of last payment to the beneficiary" to "first day of the month after the month for which VA last paid benefits to the beneficiary", where "beneficiary" represents either a child, parent, spouse, or the veteran. This phrasing is easier to understand and apply.

XIII. Subpart H: Special and Ancillary Benefits for Veterans, Dependents, and Survivors

In a document published in the Federal Register on March 9, 2007, we proposed to revise VA regulations governing special and ancillary benefits for veterans, dependents, and survivors, to be published in a new 38 CFR part 5. 72 FR 10860. We provided a 60-day comment period that ended May 8, 2007. We received submissions from two commenters: the Disabled American Veterans and a member of the general public.

Misdirected Comment

One commenter submitted a comment that states that it is intended for this regulatory package, RIN 2900-AL84, but it actually applies to RIN 2900-AL71. The issues raised in this comment are addressed in the portion of this preamble relating to RIN 2900-AL71.

§ 5.580 Medal of Honor Pension

Section 5.580 concerns Medal of Honor pension. Throughout § 5.580, we propose to change the initially proposed word “person” to “servicemember or veteran”, because only servicemembers and veterans can qualify for that benefit.

The second sentence of initially proposed § 5.580(a) stated, “After a person has been placed on the Medal of Honor Roll, and if such person has indicated a desire to receive the Medal of Honor pension, the Secretary concerned will provide VA with a certified copy of the certificate setting forth such person's right to the Medal of Honor pension.” We propose to delete this sentence, which seemed to delineate

administrative duties of the service departments. The sentence did not require or provide for any VA action. We leave it to those departments to establish appropriate procedures to administer these duties as, for example, 32 CFR 578.9(c) does for the Department of the Army. For VA's purposes, it is necessary to note only that VA receipt of a certified copy of the certificate from the service department is a prerequisite to an award of Medal of Honor pension.

We propose to move initially proposed paragraph (b) into paragraph (a) to emphasize that VA cannot adjudicate entitlement to placement on the Medal of Honor Roll or to a certificate establishing the right to Medal of Honor pension. VA adjudicates only the amount of the initial payment (that is, the lump-sum payment) and of the effective date of the monthly pension, which is set forth in the next paragraph. We were concerned that as written, initially proposed paragraph (b), which stated that "Medal of Honor pension will be awarded by VA once the certification under paragraph (a) of this section is provided to VA", could have been misinterpreted to provide an effective date.

In paragraph (b), we assign the effective date of monthly payment of such pension based on the date that the servicemember or veteran entitled to the pension files the appropriate form with the appropriate service department. Although we have generally interpreted 38 U.S.C. 5101(a) to require claimants for VA benefits to file a claim in the form prescribed by VA, that statute does not apply to claimants for the Medal of Honor pension, because the Secretary of the appropriate service department, and not VA, authorizes payment of the Medal of Honor pension. 38 U.S.C. 1561(c).

Therefore, no additional claim to VA is necessary to establish entitlement to the Medal of Honor pension.

We propose to redesignate initially proposed paragraph (c) as (b), initially proposed paragraph (d) as (c), and initially proposed paragraph (e) as (d). We changed a phrase in proposed (c)(1) [now (b)(1)] from "application for placement on the Medal of Honor Roll" to "form requesting placement on the Medal of Honor Roll". We have previously proposed, for VA purposes, that "'application' means a specific form required by the Secretary that a claimant must file to apply for a benefit" (§ 5.1). The statute authorizing the Medal of Honor Roll provides for placement on the roll "[u]pon written application," 38 U.S.C. 1560(b), "in the form . . . prescribed by the Secretary concerned". Although either "application" or "form" would be reasonable and accurate terms derived from the statute, we propose to change "application" to "form" in paragraph (b)(1) to preserve the distinction between "application" as we define it for VA purposes and any other use of the term.

Initially proposed § 5.580(c)(3) stated that VA would pay a lump sum "to each person who is receiving or who in the future receives a Medal of Honor pension". If a veteran "is receiving" a Medal of Honor pension at the time that this regulation becomes effective, then he or she will already have received the lump-sum payment. We therefore propose to revise the sentence to provide a lump-sum payment "to each servicemember or veteran who receives a Medal of Honor pension". This change is needed because part 5 will apply only to new claims, and not to existing entitlements.

The initially proposed text also stated that the lump-sum payment "will be based on the monthly Medal of Honor pension rates [in effect during a prescribed period]." The phrase "will be based on" was potentially confusing. We propose to change the text to read, "VA will calculate the amount of the lump-sum payment using the Medal of Honor pension rates in effect for each year of the period for which the retroactive payment is made."

§ 5.581 Awards of VA Benefits Based on Special Acts or Private Laws

In initially proposed § 5.581(b)(2), we had included the parenthetical definition of "pending claim". We propose to delete this definition as we have already defined "pending claim" in § 5.57(d). In addition, we clarified that the claim must be pending "at the time that the special act becomes effective." This change makes the provision more explicit.

We propose to change § 5.581(c)(1) to improve readability.

We propose to change § 5.581(c)(2) to make clear that the rule pertains to a period of service rather than to a specific date.

Initially proposed § 5.581(d)(1) stated, "VA will apply and will not change, . . . the rate, effective date, and discontinuance date that is specified in a special act." We propose to remove "and will not change" because it merely restates the fact that "we will

apply" the elements of the special act addressed in paragraph (d)(1). This will make the rule more readable without changing its meaning.

The initially proposed text in § 5.581(d)(2) stated that the effective date is determined in accordance with the applicable law, but it did not state which law. We propose to include a cross reference to § 5.152, which implements 38 U.S.C. 5110(g), to clarify what date to apply in these situations.

In § 5.581(e)(1), we propose to add the terms, "hospital, domiciliary, or nursing home care" to more accurately describe the content of several sections cited. Similarly, in § 5.581(e)(2), we propose to add the phrase, "or . . . while a fugitive felon" to more accurately describe the content of several sections cited. We also propose to include in § 5.581(e)(2) that payments will be suspended while the veteran is a fugitive felon. We also propose to add 38 U.S.C. 5313B, governing fugitive felons, to the authority citation for the section.

§ 5.583 Special Allowance Under 38 U.S.C. 1312

In § 5.583(d), we propose to add, "after VA receives a claim" to clarify that the claimant must file a claim to obtain the benefit.

We propose to make a few changes to § 5.583(e) to enhance clarity and reduce ambiguity. We also propose to correct the reference to Subpart E, so that the text will

correctly direct the reader to Subpart K. We also propose to add the statutory authority 38 U.S.C. 107, which is the statutory authority for § 5.583(b)(2).

§ 5.584 Loan Guaranty for a Surviving Spouse: Eligibility Requirements

In § 5.584, we propose to change the initially proposed phrase "may be extended" to "will be extended" to clarify that the action is not discretionary. We also propose to insert the phrase, "all of the following conditions are met" at the end of the introductory sentence and redesignate the paragraphs to enhance clarity and reduce ambiguity of the section.

In § 5.584(b)(2), we propose to add that a veteran's death treated by VA "as if" it were service connected, under 38 U.S.C. 1318, does not qualify the veteran's surviving spouse for loan guaranty certification.

We also propose to revise initially proposed § 5.584(e) to clarify that this section does not apply if the claimant is a surviving spouse who is eligible for a loan guaranty benefit as a veteran in his or her own right.

§ 5.586 Certification for Dependents' Educational Assistance

In § 5.586, "Certification for dependents' educational assistance", paragraph (c)(2), we propose to change the reference to 38 CFR 3.361 to its part 5 counterpart, § 5.350. Current §§ 3.358 and 3.800 apply to claims under 38 U.S.C. 1151(a) that VA

received before October 1, 1997. Because part 5 will apply only to future claims, we will not repeat the provisions of current §§ 3.358 and 3.800 in part 5.

Initially proposed § 5.586(a) failed to state who is potentially eligible to receive dependents' educational assistance. Accordingly, we propose to add "payable to a veteran's spouse, surviving spouse, or child," after "education benefit" to clarify who is potentially eligible for this benefit.

Also in § 5.586, we propose to remove paragraph (d)(2) and (3), which merely cross referenced the definitions of "spouse" and "surviving spouse". Because these terms are defined for purposes of all benefits administered under part 5, there is no need to include this paragraph. We propose to move the language of (d)(1) into paragraph (a).

§ 5.587 Minimum Income Annuity and Gratuitous Annuity

We propose to revise the regulation text of initially proposed § 5.587 for clarity.

In initially proposed § 5.587(a)(1), the reference to the citations to the sections of Public Law 92-425 were mistakenly written as "4(a)(2) and (3)". We propose to correct this error by changing the citations to "4(a)(1) and (2)", as stated in 38 CFR 3.811(a)(1). Further, we propose to reword the end of paragraph (c) to clarify its meaning. The initially proposed rule read, "An individual . . . shall be considered eligible for pension for purposes of determining eligibility for the minimum income annuity even though as a

result of adding the amount of the minimum income annuity authorized under Public Law 92-425 as amended to any other countable income, no amount of pension is due." The reworded version reads, "A person . . . will still be considered eligible for pension for purposes of determining eligibility for the minimum income annuity, even though no amount of pension is payable after adding the minimum income annuity, authorized under Public Law 92-425, 86 Stat. 706, as amended, to any other countable income."

Public Law 92-425 authorizes payment of benefits for commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration. The two agencies that govern these officers were not referenced in part 3. We propose to correct this omission in part 5 by adding the Department of Health and Human Services as well as the Department of Commerce in § 5.587(a)(1).

§ 5.588 Special Allowance Payable Under Section 156 of Public Law 97-377

In § 5.588(a)(1), we propose to change the regulation text to clarify that VA makes the determination of eligibility.

In § 5.588(e), we propose to eliminate the terms "formal and informal" from the initially proposed title. We have already defined the term "claim" in § 5.1 as a formal or informal communication requesting a determination of entitlement. Likewise, we refer to filing an "application" rather than "Formal claims . . . on a form prescribed by the Secretary", because we have already defined "application" in § 5.1.

We propose to remove the last sentence of initially proposed § 5.588(e), because it would impose a restriction not authorized by the governing statute. See Cole v. Derwinski, 2 Vet. App. 400 (1992), aff'd, 35 F.3d 551 (Fed. Cir. 1994). The effective date of payment of this special allowance is not based on the date of the claim, except that the date of payment cannot be prior to August 13, 1981. The last sentence of initially proposed § 5.588(e), based on current § 3.812(e), limits retroactive payment of the special allowance contrary to the governing statute. Current VA practice is consistent with this interpretation of the statute.

We propose to update the statutory authority citations contained in initially proposed §§ 5.589 and 5.590 to reflect that sec. 102(a)(1) of Public Law 108-183, 117 Stat. 2651, 2653, redesignated 38 U.S.C. 1822, 1823, and 1824 as 38 U.S.C. 1832, 1833, and 1834, respectively.

§ 5.589 Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.

In § 5.589, we propose to replace the term "individual" with "person" to maintain consistency in our usage throughout the regulations. We have also modified the wording of initially proposed § 5.589(b) to clarify any ambiguity resulting from this change.

On January 25, 2011, VA published Final Rule AN27, "Herbicide Exposure and Veterans with Covered Service in Korea" to implement the Veterans Benefits Act of

2003, Public Law 108-183, 117 Stat. 2651. 76 FR 4245. We propose to incorporate these provisions as a new paragraph (c)(2) in § 5.589 and make conforming amendments to §§ 5.57(b), 5.150(a), 5.152(a) and (d), 5.228(a), 5.262(a)(1)(ii), 5.589(a) and (e), 5.590(i), and 5.591.

In redesignated § 5.589(c)(3) we propose to change the last sentence of initially proposed § 5.589(c)(2) for clarification purposes.

§ 5.590 Monetary Allowance for a Female Vietnam Veteran's Child with Certain Birth Defects

In § 5.590, we propose to replace the term "individual" with "person" to maintain consistency in our usage throughout the regulations. We have also modified the wording of initially proposed § 5.590(b) to clarify any ambiguity resulting from this change. We also propose to clarify the regulation text of § 5.590(b) to reflect that that provision is subject to § 5.590(a)(3), which governs the payment of monetary allowance where a covered birth defect is spina bifida. We propose to add the phrase, "[e]xcept as provided in paragraph (a)(3) of this section".

In proposed §§ 5.589(a) and 5.590(a), we propose to add language from § 3.27(c), providing for an increase in monthly allowance rates under 38 U.S.C. chapter 18 whenever there is a cost-of-living increase in benefit amounts payable under the

Social Security Act. We inadvertently failed to add this language in the initially proposed rule and propose to add it now.

§ 5.591 Effective date of award for a disabled child of a Vietnam veteran or a veteran with covered service in Korea

We propose to delete initially proposed § 5.591(a)(6). Paragraph (a)(6) stated a general rule applicable to all effective dates. Because this general rule is stated in § 5.152(a), there is no need to restate it here.

§ 5.592 Awards Under Nehmer Court Orders for Disability or Death Caused by a Condition Presumptively Associated with Herbicide Exposure

We propose to add § 5.592. It is the counterpart to current § 3.816, which we inadvertently omitted from the March 9, 2007, notice of proposed rulemaking for these rules. 72 FR 10860. We intend to insert it here.

Paragraph (b)(2) of § 3.816 states, in pertinent part, "Covered herbicide disease means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102-4, other than chloracne." In July 2007, the U.S. Court of Appeals for the Ninth Circuit rejected VA's position that its duties under the Nehmer stipulation have ended and held that VA's duties extend through at least 2015. Nehmer v. U.S. Dept. of Veterans Affairs, 494 F.3d 846, 862-63 (9th Cir. 2007). Accordingly, the requirements of the Nehmer court orders for review of previously

denied claims and for retroactive payment apply to new presumptions. We therefore propose to omit the phrase "before October 1, 2002," from § 5.592. We also propose to update § 5.592(b)(2) to encompass the presumptive diseases listed in § 3.309(e), by cross referencing § 5.262(e). 38 CFR part 3 has already been amended to remove this date and the removal of the date from part 5 conforms to the part 3 change. 78 FR 54763, Sept. 6, 2013.

§ 5.603 Financial Assistance to Purchase a Vehicle or Adaptive Equipment

One commenter stated that "proposed § 5.603(b)(1)(ii) establishes limitations on the types of adaptive equipment for which an eligible person may receive financial assistance from VA to purchase." The commenter was concerned that the list of adaptive equipment found in initially proposed § 5.603(b)(1)(ii) would exclude any equipment not listed in that section.

The commenter pointed out that parts of the authorizing statutes and parts of current VA regulations use "but is not limited to" in conjunction with "includes". Further, other regulations in the initially proposed rule used language such as "including, but not limited to".

In order to eliminate any confusion, we propose to adopt the commenter's suggestion and add the "but is not limited to" language to § 5.603(b)(1)(ii), to read, "Adaptive equipment includes, but is not limited to: ". For the same reason, we propose

to add similar language to §§ 5.589(d)(2), 5.590(d)(1)(xii), 5.590(d)(2), 5.590(d)(6)(ii), 5.590(e)(1)(ii)(B), 5.590(e)(1)(iii)(B), 5.590(e)(1)(iv)(D), 5.590(e)(1)(v)(C), 5.590(e)(2)(i), 5.606(b)(1), and 5.606(b)(2).

We propose to change the regulation text in initially proposed § 5.603(b)(1)(i) to conform with the language of current § 3.808(e). The initially proposed text did not include part of the required text. The text will read, "'Adaptive equipment' means equipment that must be part of or added to a vehicle manufactured for sale to the general public to:".

Initially proposed paragraph (b)(1)(ii)(A) said, "Automatic transmission as to an eligible person who has lost, or lost the use of, a limb". We propose to delete "as to an eligible person who has lost, or lost the use of, a limb", because with that phrase in the regulation the eligible person with ankylosis of the knees or hips would not qualify for VA assistance to obtain an automatic transmission.

We propose to combine initially proposed § 5.603(b)(1)(ii)(D) and (F) (which were based on 38 CFR 3.808(e)(2) and (3)) as paragraph (b)(1)(ii)(D). They were substantially redundant. It was the intent of both § 3.808(e)(2) and (3) to set limits on the amount of assistance that VA may pay for adaptive equipment. We have always interpreted these two regulations in this way. This interpretation is also in accordance with 38 CFR 17.158(b), which also sets the same limitations on the amount of assistance for adaptive equipment.

We propose to delete initially proposed § 5.603(b)(1)(ii)(C) and redesignate initially proposed § 5.603(b)(1)(ii)(E) as § 5.603(b)(1)(ii)(C). The requirement that an air conditioner be included in the list of adaptive equipment is no longer necessary. The vast majority of new cars have air conditioners included in their standard equipment package. If VA were to receive a claim for an air conditioner, this claim could be granted because § 5.603(b)(1)(ii) contains the phrase "includes, but is not limited to", which advises the reader that this is not an exclusive list.

In paragraph (c)(2), we propose to change the phrase "loss or permanent loss of use [of a named body part]" to "Anatomical loss or permanent loss of use [of a named body part]." We intend to make this change throughout part 5. Part 3 uses both phrases interchangeably, sometimes in a single regulation and this resulted in confusion. See, for example, 38 CFR 3.350.

The statute defining the disabilities a person must have to be eligible for an automobile or adaptive equipment requires "loss or permanent loss of use" of particular body parts, 38 U.S.C. 3901, and VA interprets "loss" in that phrase as meaning anatomical loss. This interpretation is consistent with the qualification for certain levels of special monthly compensation for "anatomical loss or loss of use". See 38 U.S.C. 1114(k) through (n) and (p). We propose to change "loss of" to "anatomical loss or" in § 5.606, paragraph (b), for the same reason. We note that 38 CFR 3.810(a)(1) pertains to clothing allowance for veterans with disabilities rated as specified in § 3.350(a), (b),

(c), (d), and (f), which implement provisions of 38 U.S.C. 1114 that authorize special monthly compensation for anatomical loss or loss of use [of a named body part]. Therefore, this change is consistent with statutory intent.

We propose to revise initially proposed paragraph (c)(2)(iv) to make clear that a person with ankylosis of one or both knees, or one or both hips may only receive financial assistance to purchase adaptive equipment.

Section 803 of Public Law 111-275, 124 Stat. 2864, 2889 (2010) amended 38 U.S.C. 3901 which lists the disabilities that qualify a veteran for VA assistance to purchase a vehicle or adaptive equipment for a vehicle. We propose to add paragraph (c)(2)(v) to implement the statutory amendment by adding "[s]evere burn injury" as an qualifying disability. Section 803 indicated that what qualifies as a "severe burn injury" for purposes of obtaining automobile or adaptive equipment will be "determined pursuant to regulations prescribed by the Secretary." VA's Compensation Service is drafting a rulemaking to comply with that provision in 38 CFR part 3. Once that has been completed, the new regulatory language will be incorporated into § 5.603.

We propose to redesignate paragraph (c)(3) as paragraph (d)(1), because the content of paragraph (c)(3) is more relevant to the subject of paragraph (d), "Limitations on assistance", than to paragraph (c), "Eligibility criteria." We also propose to add a provision to paragraph (d)(1)(i) based on 38 U.S.C. 3902(d), that VA will assist a person

who cannot qualify to operate a vehicle to purchase a vehicle, if another person will drive the vehicle for him or her.

As a result of redesignating initially proposed paragraph (c)(3) as paragraph (d)(1), we propose to redesignate initially proposed paragraphs (d)(1) and (d)(2) as paragraphs (d)(2) and (d)(3). We propose to clarify the text in redesignated § 5.603(d)(3). As written, the initially proposed text failed to include the reference to circumstances beyond the control of the eligible person. We propose to revise the text by inserting the phrase, "due to circumstances beyond the eligible person's control," between "a 4-year period unless," and "one of the adapted vehicles". We also propose to add to the second sentence the words "or reimbursements" after "payments", because we unintentionally omitted it from the original text. We therefore propose to revise the sentence to read, "The Under Secretary for Health or designee may authorize payments or reimbursements for the repair, replacement, or reinstallation of adaptive equipment deemed necessary for the operation of the vehicle." We also propose to delete "§§ 17.156 through" from the cross reference, which is now only to § 17.158, because §§ 17.156 and 17.157 do not pertain to the subject of the cross reference.

We have determined that initially proposed § 5.603(f), "Redemption of certificate of eligibility", was inaccurate. Therefore, we propose to restructure this paragraph to encompass both the purchase of the vehicle and the purchase of adaptive equipment. Paragraphs (f)(1)(i) and (2)(i) address redemption of a certificate of eligibility by the seller, and paragraphs (f)(1)(ii) and (2)(ii) address redemption of a certificate of eligibility

by the eligible person. Together, these paragraphs cover the scenarios where the vehicle or adaptive equipment was purchased prior to an eligible person acquiring the certificate of eligibility.

§ 5.604 Specially Adapted Housing Under 38 U.S.C. 2101(a)

In our proposed rulemaking, 72 FR 10860, Mar. 9, 2007, we had reserved §§ 5.604 and 5.605 while VA completed a rulemaking to implement housing provisions of the Veterans Benefits Act of 2003, the Veterans Benefits Improvement Act of 2004, the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, and the Housing and Economic Recovery Act of 2008. VA has now amended 38 CFR 3.809, "Specially Adapted Housing under 38 U.S.C. 2101(a)", and § 3.809a, "Special Home Adaptation Grants under 38 U.S.C. 2101(b)". 75 FR 57859, Sept. 23, 2010. We now propose to incorporate §§ 3.809 and 3.809a, as amended, into part 5 with several stylistic changes.

§ 5.606 Clothing Allowance

We propose to clarify initially proposed § 5.606(a) to state: "VA will pay an annual clothing allowance to a veteran with a qualifying disability. However, VA will pay more than one annual clothing allowance if VA determines that the veteran has more than one qualifying disability." This is consistent with the decision in Sursely v. Peake, 551 F.3d 1351, (Fed. Cir. 2009). The court held that Congress intended to allow each eligible veteran one clothing allowance per year per qualifying disability. On February,

2, 2011 VA proposed a rule, AN64 Clothing Allowance, to implement Sursely. 76 FR 5733. Once the Final Rule has been published, it will be incorporated into § 5.606.

We also propose to clarify the term "veteran" as it applies to a person who is eligible for clothing allowance. VA General Counsel's opinion VAOPGCPREC 4-2010, (May 25, 2010), held that the "term [veteran] includes individuals who have returned to active duty after previously meeting the definition of 'veteran.'" We propose to incorporate this holding in proposed § 5.606(a).

We propose to consolidate initially proposed § 5.606(a), (b), and (b)(1) for clarity and simplicity, without changing the meaning.

Initially proposed § 5.606(b)(2) addressed all service-connected disabilities for which the veteran wears or uses a prosthetic or orthopedic appliance that wears or tears clothing. Current § 3.810 distinguishes disabilities compensated at a rate specified in § 3.350(a) through (d) or (f) and other service-connected disabilities that require an appliance. We propose to revise the paragraph to maintain the distinction in the current regulation. We propose to address the disabilities compensated at the rate specified in §§ 5.322 through 5.329, 5.331, or § 5.332 and redesignate the paragraph as (b)(1).

Initially proposed § 5.606(b)(2) did not distinguish between applications for clothing allowance that VA can grant after a required examination and those that require

certification by the Under Secretary for Health or designee, as does current § 3.810. We propose to revise the paragraph to maintain this distinction, and redesignate it as paragraphs (b)(1) through (3).

In initially proposed § 5.606(b)(2), we used the term "VA determines" in place of the term "Chief Medical Director or designee", which part 3 uses for the VA office now designated as Under Secretary for Health. We propose to revise paragraph (b)(2) to use "Under Secretary for Health or designee". This change eliminates any ambiguity about who makes the determination.

We propose to change § 5.606(c)(1) and (2) to state the circumstances in which the veteran need not file the claim for a clothing allowance annually. VA has provided for the annual clothing allowance without requiring the filing of an annual claim, as stated in paragraphs (c)(1) and (2), since the inception of the clothing allowance benefit in 1972. VA form 10-8678, "Application for Annual Clothing Allowance (Under 38 U.S.C. 1162)", implements this long-standing practice.

We propose to rewrite initially proposed § 5.606(d) for clarity. We propose to delete the term "anniversary date". Although we had defined the term, we have determined that it is confusing to the reader, and have opted to use the actual date of August 1 instead. We also propose to define the "payment year" for which VA pays the annual clothing allowance as the "12-month period beginning August 1 and ending July

31 of the following year." For this reason, we propose to delete the term "anniversary date" in § 5.606(e) as well.

We propose to rewrite initially proposed § 5.606(e) for clarity. We propose to change "within 1 year of" and "within 1 year from" to "no later than 1 year after". This change makes clear that the time to file a claim relative to August 1 means the year after August 1. We also propose to remove the term "initial anniversary date" and instead, describe the first period for which VA pays a veteran a clothing allowance as the "initial year of payment eligibility".

We propose to remove initially proposed § 5.606(f). Paragraph (f) contained information already in Subpart I of part 5, which pertains to Filipino veterans. One purpose of proposed Subpart I is to assemble in one place all of the adjudication regulations dealing with benefits for certain Filipino veterans. It would be redundant to repeat that information in § 5.606. Additionally, paragraph (f) stated that claims for clothing allowance by Filipino veterans are processed in Manila. This is purely a matter of internal VA administration of claims. The paragraph conferred no benefit on the veteran, and it did not require the claimant to take any action. We propose to remove the paragraph as an unnecessary regulation.

We propose to remove initially proposed § 5.606(g). Paragraph (g) informed the veteran living abroad that the VA Medical Center (VAMC) with jurisdiction over his permanent address has jurisdiction over a claim for a clothing allowance. The

assignment of claims to specific facilities is purely a matter of internal VA administration of claims. The paragraph conferred no benefit on the veteran. We propose to remove the paragraph as an unnecessary regulation. As a result of removing paragraphs (f) and (g), we will redesignate paragraph (h) as paragraph (f).

Technical Corrections

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain additional changes in this reproposed rule: adding, updating, and moving some authority citations, correcting a citation, and correcting citation format. For example, proposed § 5.584, "Loan guaranty for a surviving spouse: eligibility requirements", lacked an authority citation at the end of the section. We intend to correct this omission by adding the authority citation, 38 U.S.C. 3701(b)(2). We also propose to add to the authority citation for § 5.587.

Changes in Terminology

For consistency of terminology throughout part 5, we propose to replace the term "evaluation" with the term "rating", and "evaluated" with "rated", whenever either appears in §§ 5.589(d), 5.590(a)(3), and 5.590(e).

We also propose to correct our use of the terms "claim" and "application". Under 38 CFR 3.1(p), "Claim–Application" is defined as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to

a benefit." Under § 5.1, "Claim" is defined as "a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit." Under § 5.1, "Application" is defined as "a specific form required by the Secretary that a claimant must file to apply for a benefit." Accordingly, the following changes are proposed to be made. We propose that the words "formal application" be replaced with the word "claim" every time they appear in § 5.581(b), and the phrase "in the form prescribed by VA" be removed. We also propose that the phrase "on a form prescribed" be removed from § 5.583(c). We also propose that the words "an application" be replaced with the words "a claim" in the introductory text of § 5.584. In addition, we propose that the phrases and word "on a form prescribed by the Secretary of Veterans Affairs", "form", and "on the prescribed form" be removed from § 5.588(e). Finally, we propose that the words "application form" and "application" be replaced with the word "claim" in every place they appeared in initially proposed §§ 5.603(d)(1), 5.606(b)(3), and 5.606(e).

XIV. Subpart I: Benefits for Certain Filipino Veterans and Survivors

In a document published in the Federal Register on June 30, 2006, we proposed to revise VA's regulations governing benefits for certain Filipino veterans and their survivors, to be published in a new 38 CFR part 5. 71 FR 37790. The title of this proposed rulemaking was, "Benefits for Certain Filipino Veterans and Survivors" (RIN: 2900-AL76). We provided a 60-day comment period that ended August 29, 2006. We did not receive any submissions from commenters pertaining to this proposed rule.

Although no comments were received regarding our publication on June 30, 2006, an internal review of proposed Subpart I revealed minor typographical errors and a need for further clarification in several areas. Accordingly, based on the rationale set forth in the initially proposed rule and this proposed document, we propose to adopt the provisions of proposed Subpart I, with the following changes discussed below.

Publication of Revisions to Subparts

The publication for proposed Subpart I also contained minor revisions to Subpart B, "Service Requirements for Veterans", and Subpart E, "Claims for Service Connection and Disability Compensation", which had been previously published in proposed rulemaking packages. Those revisions will be contained in this proposed rule segment. The package for Subpart I was one of two packages that contained revisions to other subparts, and since then we have decided to publish all revisions to the various subparts together in this proposed rule in order to facilitate an easier referencing process.

§ 5.610 Eligibility for VA Benefits Based on Philippine Service

Initially proposed § 5.610(b)(3) incorrectly stated that service as an officer commissioned in connection with administration of Public Law 79-190 is not active military service for purposes of VA benefits. Administrator's Decision 778 (Mar. 5, 1948) concluded that service as a commissioned officer in connection with administration of Public Law 79-190 would constitute regular active military service–that is, it would qualify for all benefits available to U.S. veterans. Among other things, that

opinion noted that because such commissioned service was not service pursuant to section 11 of Public Law 79-190 (relating to enlistments), it was not subject to the limitations currently codified in 38 U.S.C. 107(b). Therefore, we propose to correct this error in paragraph (a) of § 5.610.

In § 5.610(c)(1), we propose to change "General Officer, U.S. Army" to "Commander-in-Chief, Southwest Pacific Area, or other competent authority in the Army of the U.S." to further specify the type of authority needed to establish active military service in the Commonwealth Army of the Philippines.

§ 5.613 Payment of Disability Compensation or Dependency and Indemnity Compensation at the Full Dollar Rate for Certain Filipino Veterans or their Survivors Residing in the U.S.

In order to clarify the list of acceptable items of evidence in regards to a veteran's or veteran's survivor's eligibility for compensation at the full-dollar rate under § 5.613(c)(2) and a veteran's burial benefits at the full-dollar rate under § 5.617(c)(2), a valid original or a valid copy of any of the enumerated items, such as a U.S. passport, is required. In both instances, we propose to add the modifier word "valid" to the terms "copy" and "original", and remove the unnecessary word "valid" in front of "U.S. passport".

§ 5.614 Effective Dates of Benefits at the Full-Dollar Rate for a Filipino Veteran and His or Her Survivor

We propose to divide initially proposed § 5.614(b)(3) into paragraphs (b)(3) and (b)(4) and clarify these provisions. First, we propose to insert the word "veteran's" before "survivor" in both places where the term "survivor" is used. Second, we propose to clearly set out the rules for the following classes of beneficiaries: those who were absent from the U.S. for a total of 183 days or more and returned to the U.S. during the same calendar year, and those who were absent from the U.S. for a total of 183 days or more and returned to the U.S. in a later calendar year but less than 183 days after the beginning of such calendar year. This revision does not reflect a new policy; rather it is a clarification of current § 3.405(b)(2). We also propose to redesignate the remaining paragraphs under § 5.614(b) accordingly.

Technical Corrections

We propose to make several changes to certain provisions describing the dates relevant to eligibility for burial benefits at the full-dollar rate. Initially proposed § 5.610(b)(1) and the chart in initially proposed § 5.612 referred to deaths occurring "on or after December 16, 2003". We propose to revise this to refer to deaths occurring "after December 15, 2003" in order to conform to the format used in current 38 CFR 3.43 and the format generally used for dates throughout part 5. Initially proposed § 5.617(b) referred to deaths occurring "after November 1, 2000". However, the corresponding provisions of the chart in proposed § 5.612 inaccurately referred to deaths occurring "on or after 11/1/00". As stated in the notice of proposed rulemaking, the chart in § 5.612 is intended only to summarize the provisions in Subpart I and not to confer any additional rights. Accordingly, we propose to correct the inadvertent error in

the chart by replacing “on or after 11/1/00” with “after 11/1/00” to ensure that the chart accurately reflects the applicable rule.

XV. Subpart J: Burial Benefits

In a document published in the Federal Register on April 08, 2008, we proposed to revise Department of Veterans Affairs (VA) regulations governing burial benefits, to be published in a new 38 CFR part 5. 73 FR 19021. The title of this proposed rulemaking was “Burial Benefits” (RIN: 2900-AL72). We provided a 60-day comment period that ended June 9, 2008. We received submissions from two commenters: two members of the general public.

General Comment

One commenter expressed satisfaction with the rewritten provisions in proposed RIN 2900-AL72, “Burial Benefits”. The commenter explained that veterans have a right to these more detailed regulations with a “plain layout” that one “can read . . . without any misunderstanding.” The commenter went on to say that “there is nothing wrong with being more straight forward with the provisions especially when it comes to burial provisions. Pass the rule and be done with it, let the confusion be dismissed.” No changes to the proposed rule were suggested. Although we are pleased that the commenter finds these rules an improvement over part 3, we regret that we cannot accelerate the effective date of one subpart of part 5 because, administratively, it would be too cumbersome and costly to establish part 5 in stages. We propose not to make any changes based on this comment.

§ 5.630 Types of VA Burial Benefits

We propose to add a definition of "burial" as new paragraph (b) to ensure that readers know that VA pays burial benefits for all the legal methods of disposing of the remains of deceased persons, including, but not limited to, cremation, burial at sea, and medical school donation.

We propose to revise this paragraph by adding the phrase "or interment" after "memorialization" to clarify the distinction between interment and memorialization. Interment refers to placing a body into the ground. Memorialization honors a person whose remains have not been found.

In addition, to avoid potential confusion for readers, we propose to clarify that the burial regulations in part 5 do not apply to the benefit programs listed in paragraph (c), which operate under separate statutes and regulations.

§ 5.631 Deceased Veterans for Whom VA May Provide Burial Benefits

We propose to redesignate the paragraphs of this rule according to the revisions described below. First, we propose to delete initially proposed paragraph (b), which had required that the veteran upon whom a claim for burial benefits is based to have been discharged or released from service under conditions other than dishonorable, and

added such a requirement to what is now proposed paragraph (a). This makes the rule simpler to read and easier to apply.

Second, we propose to delete initially proposed paragraph § 5.631(c). This paragraph was derived from current 38 CFR 3.1600(d). The paragraph was ambiguously written, but was intended to state merely that VA can reopen a claim for service-connected death if new and material evidence is presented. This rule is not a rule concerning burial benefits, but is a more general rule that can affect the provision of any benefit based on a service-connected death. We propose to delete initially proposed § 5.631(c) for these reasons, and because it is redundant of the new-and-material-evidence rule found in § 5.55.

§ 5.633 Claims for Burial Benefits

We propose to revise § 5.633(a)(1) to clarify that a claim to reopen nonservice-connected burial allowance must be filed no later than 2 years after the date of the veteran's burial. This revision is consistent with § 3.1600(b), and current VA practice.

In paragraph (a)(2), we propose to revise the first sentence to eliminate any reference to the nonservice-connected burial allowance. Neither the law nor VA policy prevents providing the service-connected burial allowance to a person whose discharge is upgraded posthumously. The initially proposed regulation had not provided for such a limitation because, although this specific provision had applied only to nonservice-connected burial benefits, there was no time limit to file a claim for service-connected

burial benefits and, therefore, there was no bar against filing a claim (or a claim to reopen) for a service-connected burial allowance at any time after the veteran's death. However, the regulation is clearer without the reference to nonservice-connected burial benefits in the first sentence because it cannot be misinterpreted as a rule that limits to the nonservice-connected burial allowance the applicability of an award based on a posthumously upgraded character of discharge.

In initially proposed § 5.633(b)(1), we stated, "Evidence required to substantiate a claim for burial benefits must be submitted no later than 1 year after the date VA requests such evidence." This sentence was based on current § 3.1601(b), which was intended to implement 38 U.S.C. 2304. That statute provides, in pertinent part:

> If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the applicant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no [non-service connected burial] allowance may be paid.

Instead of using § 3.1601(b)'s term, "complete a claim", we mistakenly used "substantiate a claim". The rule on filing of evidence to "substantiate [a] claim" is contained in the portion of § 5.90 that is based on current § 3.159(b)(1). See also § 5.136, which is based on current § 3.158(a). The rules on filing an "incomplete application" are contained in the portion of § 5.90 that is based on current §§ 3.109(a)(1) and 3.159(b)(2). Because these rules are already contained elsewhere in part 5, there is no need to repeat them in subpart J and so we propose to delete the above referenced sentence from § 5.633(b)(1).

One commenter suggested that § 5.633(b)(1)(iii), regarding the information needed in a statement of account, should read “the dates of expenses incurred for services rendered” and not “the dates and expenses incurred for services rendered”. We disagree with the commenter’s suggestion. By placing “of” instead of “and” in this part of § 5.633(b)(1)(iii), the meaning of the regulation would be changed. Using the word “of” in this context would restrict the information that VA requires for a statement of account to only the dates on which the expenses were incurred. In contrast, using the word “and” signifies that VA requires the dates as well as the expenses incurred for the services rendered. This interpretation is supported by the similar language found in § 3.1601(b), upon which § 5.633(b) is based. However, we propose to clarify the sentence to eliminate the possibility that it could be read to refer only to the dates of the expenses incurred.

We propose to revise initially proposed § 5.633(b)(1)(iv) for clarity, and to eliminate redundancy.

§ 5.634 Reimbursable Burial Expenses: General

Initially proposed § 5.634(b)(2) had barred reimbursement for an item or service “previously provided or paid for by the U.S. Government.” We propose to clarify this sentence because we will, in fact, reimburse for the cost of a uniform if a new uniform was purchased because the veteran’s service uniform was not in a condition suitable for burial.

§ 5.635 Reimbursable Transportation Expenses for a Veteran Who is Buried in a National Cemetery or Who Died While Hospitalized by VA

A commenter suggested that the word "persons" should be replaced by the word "veterans" in the introductory sentence of § 5.635. The commenter stated that otherwise it is awkward wording since the sections referred to in the introduction, §§ 5.639 and 5.644, do refer to veterans specifically. We understood the commenter's point to be that VA will only reimburse expenses connected with the transportation of a deceased veteran. To the extent that the introductory sentence to the regulation could have been read otherwise by use of the word "persons", we propose to revise the sentence for clarity.

Proposed paragraphs § 5.635(a) and (b) are not an exclusive list of reimbursable transportation expenses. We propose to reword and add the phrase "but are not limited to" to the introductory sentence in § 5.635, in order to be consistent with § 3.1606 and with current practice.

§§ 5.643 Burial Allowance Based on Nonservice-connected Death, and 5.644 Burial Allowance for a Veteran Who Died While Hospitalized by VA

A commenter suggested that we replace "based upon" with "for" in §§ 5.643(b) and 5.644(b). The commenter believes that the revision would make the regulatory language plainer, simpler, and more reader-focused. We agree with the suggestion and propose to replace the words "based upon" with "for" in the introductory sentences of §§ 5.643(b) and 5.644(b).

§ 5.644 Burial Allowance for a Veteran Who Died While Hospitalized by VA

One commenter questioned the reasoning behind referring to the Canal Zone in § 5.644(d). The commenter stated that since the U.S. returned ownership of the Canal Zone to Panama, the location should not be listed. Section 5.644 listed the Canal Zone because it is included in the applicable statute (see 38 U.S.C. 101(20)). However, we now propose to include the Canal Zone in our definition of "State" in § 5.1, as stated above. Therefore, we propose to remove all references to the Canal Zone in proposed § 5.644(d), and simply use the term "State".

We received one comment regarding a proposal not to include a part 5 counterpart to § 3.1605(b), which denies eligibility for transportation expenses to "retired persons hospitalized under section 5 of Executive Order 10122 . . . issued pursuant to Public Law 351, 81st Congress, and not as Department of Veterans Affairs beneficiaries". Section 5 of Executive Order 10122 relates to current and former servicemembers who had been hospitalized for chronic diseases between May and October of 1950. The commenter noted that, in a preliminary draft, VA proposed to delete this section. The commenter approved removing this section, but only if there was evidence that removing it would not affect any veteran's benefits.

As stated in the AL72 NPRM preamble, we proposed not to include in part 5 the rule in current § 3.1605(b) that denies eligibility for transportation expenses to "retired persons hospitalized under section 5 of Executive Order 10122 . . . issued pursuant to

Pub. L. 351, 81st Congress, and not as Department of Veterans Affairs beneficiaries." Section 5 of Executive Order 10122 related to current and former servicemembers who had been hospitalized for chronic diseases between May and October of 1950. Executive Order 10122 is more than half a century old and applied to a very small group of veterans. The reference is outdated and no longer necessary. In response to the comment, we note that if any such claim arises in the future, VA will process it under Public Law 351, 81st Congress, and Executive Order 10122, so no veterans benefits will be affected by the omission from part 5.

§ 5.649 Priority of Payments When There is More Than One Claimant

We propose to clarify initially proposed § 5.649(e) to state that "Any claimant may waive his or her right to receive burial benefits in favor of assigning his or her right to another claimant." This change is consistent with current VA practice.

§ 5.651 Effect of Contributions by Government, Public, or Private Organizations

In § 5.651(c)(2), we propose to use active voice to clarify that VA will not pay burial allowance in the circumsantces stated. We also propose to improve readability by changing "in" to "occurring during" before "active military service", and removing the comma after "service".

Technical Corrections

One commenter pointed out several necessary technical changes and a correction that we propose to make. First, we propose to move the misplaced opening

parenthesis in § 5.636(a)(2)(ii). Second, we propose to correct the grammar when referring to interment in §§ 5.638(c)(2) and 5.643(e)(2) by adding the word "a" before "State veterans cemetery", both places these words appear. Finally, we propose to correct the date in § 5.653 from "December 1, 1957" to correctly read "December 31, 1957", as provided in the enabling statute, 38 U.S.C. 2305.

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain technical corrections. For example, we propose to replace "in line of duty" with "in the line of duty". In addition, the initially proposed rule used "at the time of death" interchangeably with "on the date of death". In most VA claims, the time of death is not relevant, only the date of death. The only exception is § 5.644(b)(6), which discusses whether a veteran was hospitalized by VA but was not at the VA facility at the time of death. We therefore propose to replace "at the time of death" with "on the date of death" throughout the burial regulations. These changes are meant to achieve consistency throughout the part 5 regulations.

XVI. Subpart K: Matters Affecting the Receipt of Benefits

In a document published in the Federal Register on May 31, 2006, we proposed to revise VA regulations governing matters affecting the receipt of benefits, to be published in a new 38 CFR part 5. 71 FR 31056. The title of this proposed rulemaking was "Matters Affecting the Receipt of Benefits" (RIN: 2900-AM05). We provided a 60-day comment period that ended on July 31, 2006. We received submissions from four

commenters: American Psychiatric Association, Disabled American Veterans, the National Organization of Veterans' Advocates, and Vietnam Veterans of America.

§ 5.660 In the Line of Duty

Initially proposed § 5.660(a) stated, "Except as provided in § 3.310 of this chapter, VA may grant service connection only for an injury, disease, or cause of death that was incurred or aggravated in line of duty." This was a misstatement of the language in § 3.301(a) that states, ". . .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. . ." Under its authorizing statutes, VA service connects disability or death, not injury or disease *per se*, so we propose to correct § 5.660(a) to read, ". . .VA may grant service connection only for a disability or death that was incurred or aggravated in the line of duty."

Initially proposed § 5.660(c)(4) provided that an injury was not incurred in the line of duty if it was incurred while the veteran was "Confined under a sentence of civil court for a felony as determined under the laws of the jurisdiction where the veteran was convicted by such court." A virtually identical rule appears in 38 U.S.C. 105(b). However, we were concerned that the phrase "civil court" could be misconstrued to exclude a criminal court. Clearly, such an interpretation is incorrect as shown by the statutory and regulatory references to a felony. We interpret the statutory reference to a "civil" court to be a reference to a court other than a U.S. military court, that is, it refers to a "civilian" court, and propose to modify the paragraph accordingly.

Initially proposed § 5.660(d) read, "A service department finding that injury, disease, or death occurred in line of duty will be binding on VA unless the finding is patently (clearly) inconsistent with the laws administered by VA." In responding to our proposed rule, a commenter opined that use of the terms "patently" and "clearly" created a new evidentiary standard, and suggested that VA “stick with evidentiary standards for which there are precedents in VA law.”

Under our current regulation, 38 CFR 3.1(m), a service department line-of-duty finding is binding on VA unless it is “patently inconsistent with” VA law. The purpose of this regulatory presumption is pro-veteran; VA does not intend to question a service department line-of-duty finding unless that finding would lead to a result that is contrary to the laws concerning the provision of veterans’ benefits. An example of such an inconsistent finding might be that a veteran’s injury was incurred as a result of the abuse of alcohol, but nevertheless was in the line of duty. VA could not accept such a finding because we are barred from providing service-connected disability compensation if “the disability is the result of . . . abuse of alcohol”. 38 U.S.C. 1110.

The binding nature of a service-department line-of-duty finding is a regulatory interpretation of 38 U.S.C. 105(b), which reads that, “The requirement for line of duty will not be met” if the veteran was avoiding duty, confined under sentence of court martial or for felony charges in a civil court, etcetera. These are all legal issues where, as a matter of law, the veteran was not performing a duty for the military. There is no

need to weigh evidence under such circumstances because, as a matter of law, the evidence cannot overcome the statutory bar. For this reason, we reject the commenter's suggestion that we use a common evidentiary standard of proof in this situation; the question is neither about the quality of the evidence, nor the weight of the evidence. For these reasons, we also do not describe the evidentiary rule as a "presumption." Therefore, we propose not to revise the rule to include a standard of proof.

However, based on the comment, we understand that addition of the word "(clearly)" caused confusion, leading the commenter to believe that this regulation does in fact establish an evidentiary burden. Therefore, we propose to use the language in current § 3.1(m), which uses the word "patently", without "(clearly)".

We note that the above analysis does not apply in the same way to § 5.661(f), which also proposed to use the phrase, "patently (clearly)", as discussed below.

§ 5.661 Willful Misconduct

We have determined that the definitions of "willful misconduct", "proximately caused", and "drugs" proposed in the NPRM should be moved into § 5.1, "General definitions", because they relate to other sections in addition to those found in this subpart.

One commenter suggested that VA should adjudicate claims in the following manner:

- Identify the act that was the proximate cause of the disability; and then,
- Determine whether that act constituted willful misconduct.

For the reasons stated below, we propose to make no changes based on this comment.

A chronic disability first shown in service or aggravated by service is considered to have been incurred in the line of duty unless (1) it is not an injury or disease "within the meaning of applicable legislation", see 38 CFR 3.303(c); or (2) the evidence shows that the disability was due to willful misconduct. A determination of whether willful misconduct is the proximate cause of a claimed disability is only made when the evidence shows or indicates the disability may have been caused by the veteran's willful misconduct. If there is evidence that the disability may have been due to willful misconduct, the adjudicator develops for additional evidence, if needed. The entire body of evidence is reviewed and the determination concerning proximate cause and willful misconduct are made at the same time based on the same evidence. If the claimed disability was not proximately caused by willful misconduct, service connection is granted. We propose to make no changes based on this comment because it might lead a reader to mistakenly believe that VA develops the issue of willful misconduct in every claim for service connection. In addition, we do not believe it is generally appropriate to mandate the precise order in which VA adjudicators must consider the evidence in a particular adjudication, because the most effective order may depend on the facts of the case.

One commenter expressed the opinion that the words “substance,” “alcohol,” “addiction,” and “frequent” should be defined. We decline to do so by regulation because these words have commonly understood meanings. We propose to make no changes based on this comment.

One commenter noted that VA referred to alcohol and drugs separately, which could cause confusion because, the commenter asserted, alcohol is also a drug. In 38 U.S.C. 105(a), Congress identified the use of alcohol and drugs, separately. 38 U.S.C. 105(a) (barring a line-of-duty finding where injury or disease was a result of “abuse of alcohol or drugs”). Our regulation uses both terms for consistency with the statute.

One commenter was concerned with whether the frequency of use or the addiction of the user was to be used by VA to determine willful misconduct. The commenter suggested the regulation be amended to clarify which standard was to be used. There are two issues here. First, whether the addiction itself may be service connected, and second, whether a disability that was proximately caused by frequency of use or addiction to alcohol or drugs may be service-connected. The law is clear that primary disability of addiction, at least when such addiction is due to alcohol or drug abuse, cannot be service connected. 38 U.S.C. 1110. We propose to make no changes based on this portion of the comment.

Neither frequency of use nor addiction of the user determines whether an event is due to willful misconduct. Rather, the determination is based on whether the veteran was intoxicated by drugs or alcohol at the time of the event that caused the disability, and whether that intoxication was the proximate cause of the disability. See § 5.661(c)(1)(i) and (ii), (c)(2)(i) and (ii). Because VA considers neither addiction nor frequency of use to determine whether the specific event that caused the disability was due to use of alcohol, drugs, or other substances, we propose to remove initially proposed paragraph (c)(2)(i), renumber the remaining paragraphs in (c), and remove the reference to addiction from proposed (c)(2)(v).

A commenter asserted that the use of the phrase "isolated and infrequent", in initially proposed paragraph (c)(2)(i), was contradictory because "isolated" suggests a one-time use and "infrequent" means multiple uses. One commenter recommended that there be a regulatory requirement that addiction to alcohol, drugs, or other substances, or other use disorders, be determined by a psychiatrist on a medical basis. Because we are removing paragraph (c)(2)(i) and the reference to addiction in proposed paragraph (c)(2)(v) (now (c)(2)(iv)), these comments are moot and we propose to make no changes based upon them.

One commenter felt the regulation should be revised conceptually, and modernized to preclude a finding of "willful misconduct" on the basis of a claimant's medically documented drug addiction or drug abuse. The commenter noted that the influence of drug addiction or abuse affects a veteran's ability to formulate sufficient

intent and to appreciate the consequences of his or her actions. Another commenter expressed the opinion that the determination of proximate cause should be separated in the regulatory scheme from willful misconduct and that the determination should focus on the act causing the disability. We are prohibited from amending the regulations to comply with these comments. The prohibition against granting service connection for willful misconduct and the prohibition against granting service connection for disability caused by alcohol or drug abuse is contained in 38 U.S.C. 105(a), which reads, "An injury or disease incurred during active military . . . service will be deemed to have been incurred in line of duty . . . unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs." Thus, we cannot make any changes based on these comments because the suggested changes are beyond our statutory authority.

One commenter discussed § 5.661(c), stating that after VA determines that a person was intoxicated at the time of committing a particular act, the next step should be a determination of whether the person was mentally capable of committing the act in a deliberate or intentional manner with knowledge of, or wanton and reckless disregard of, its probable consequences. The commenter speculated that an intoxicated person may not be capable of forming the intent. While intent is an element in willful misconduct determinations, intent is not an element in determining whether alcohol or drug abuse was the proximate cause of the disability. In 38 U.S.C. 105, Congress made a distinction between willful misconduct, an act with an intent element, and abuse

of alcohol or drugs, an act without an intent element. Since abuse of alcohol or drugs has no intent element, we propose to make no changes based on this comment.

One commenter stated that initially proposed "[§] 5.661(c) provides that 'intoxication' can be considered 'willful misconduct' if it is the 'proximate cause' of the claimed disability or death." The commenter then opined that under the proposed regulation VA would use an indirect finding of intoxication in order to find willful misconduct, instead of basing that finding on the act causing the disability or death. This is not correct. In § 5.661(c)(1)(i), we stated, "If a person consumes alcoholic beverages to the point of intoxication and that intoxication proximately causes injury, disease, or death, VA will consider the injury, disease, or death to have been proximately caused by willful misconduct." Alcohol or drug abuse that does not cause a disability or death is not willful misconduct. Alcohol or drug abuse that causes disability or death, whether because of impaired physical capability or judgment, or both, is willful misconduct. We therefore propose to make no changes based on this comment.

One commenter expressed the opinion that the provisions of § 5.661(a) and (b) that prohibit granting service connection, and because of that prohibition dependency and indemnity compensation, as a result of a veteran's misconduct, were an expansion of the current prohibition and unfair to innocent survivors. This commenter noted that this issue was being litigated, at the time of the preparation of the commenter's comment. However, after the commenter submitted the comment, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decided Myore v. Nicholson, 489 F.3d

1207 (Fed. Cir. 2007). In Myore, the Federal Circuit held that "38 U.S.C. 1310 authorizes DIC for the survivors of a servicemember who dies while on active duty if the death is not the result of the servicemember's own willful misconduct." Id. at 1212. The Federal Circuit agreed with VA's long-standing interpretation of the statutes that willful misconduct, for purposes of death benefits and as the cause of death, prohibits the servicemember's survivors from being granted benefits. Because the part 5 rule is consistent with Myore, we propose to make no changes based on this comment.

Initially proposed § 5.661(d)(2)(iii) read, “A reasonable, adequate motive for suicide may be established by affirmative evidence showing circumstances which could lead a rational person to self-destruction.” In § 5.3(e), we propose to state that “VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue.” Although we are not aware of any particular cases in which VA reversed a service department finding of mental unsoundness based on the absence of any evidence of record corroborating such finding of mental unsoundness, our regulation should not foreclose the possibility. We therefore propose to remove the word “affirmative” from § 5.661(d)(2)(iii) and insert the word “competent” in its place. We note as well that although this may be viewed as a restrictive change, in fact and practice, VA never intended a result other than that which is compelled by the revision.

The same commenter opined that the requirement in § 5.661(d)(2)(iii) that suicide not be considered an act of mental unsoundness if the evidence shows that the deceased had a “reasonable, adequate motive for suicide” is a “heretofore unknown[ ]

standard of evidence” that requires VA to make “grim, heartless, and at their center, irrational decisions.” First, the requirement of a showing of a “reasonable, adequate motive” is not “heretofore unknown”. Section 5.661(d)(2)(iii) restates current § 3.302(b)(2), which also uses the phrase “reasonable adequate motive”. Second, this evidentiary rule has not led VA to make irrational decisions in determinations concerning suicide, and most cases involving suicide are, quite understandably, “grim”. We see no reason to change VA policy based on this comment. However, we propose to add a comma after the second word of the paragraph, changing the wording from "A reasonable adequate motive" to "A reasonable, adequate motive". We propose this change in order to clarify that the word, "reasonable" modifies "motive" and not "adequate."

The same commenter argued against the use of the “affirmative evidence” standard in § 5.661(d)(2)(iii) because the commenter believed that “affirmative evidence” was a quantitative level of proof that is less than a preponderance. The commenter opined that the standard of proof was too low to determine whether suicide was due to willful misconduct, and urged VA to adopt a “clear and convincing evidence” standard. We propose to make no changes based on this comment for several reasons. First, as explained above, we are eliminating the reference to “affirmative evidence”. Second, that standard is a qualitative one—it describes the nature of the evidence—and not a quantitative one. Thus, it has no effect on the burden of proof and could not be read to permit VA to find that suicide was not evidence of mental unsoundness based on less than a preponderance of the evidence. To the extent that

the commenter believes that such a finding ought to be based on more than a preponderance of the evidence, we note, as discussed in the preamble to § 5.3, that the statutory default standard for rebutting findings favorable to a claimant is the preponderance standard. The application of a higher standard is appropriate only when a law mandates that higher standard.

In initially proposed § 5.661(e) we repeated current § 3.301(c)(1) which states, "[W]hether 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 the line of duty will not govern." We have determined that this provision is unnecessary because it potentially conflicts with the first sentence of § 5.661(e) (based on the first sentence of § 3.301(c)(1)), which simply states, "VA will not consider the residuals of venereal disease to be the result of willful misconduct." Moreover, it has been decades since the military services penalized servicemembers for failing to promptly report veneral disease (see 37 FR 20336 (Sep. 29, 1972)), so the sentence is outdated. We therefore propose not to include it in § 5.661(e).

Finally, regarding § 5.661(f), we address the proposal to replace the "patently (clearly) inconsistent" standard to rebut a service-department finding that a particular injury, disease, or death was not due to willful misconduct. As to the line-of-duty presumption in § 5.660(d), discussed above, we removed the word "(clearly)" because it gave the wrong impression that that rule established an evidentiary presumption. But

unlike §§ 5.660(d) and current 3.1(m), §§ 5.661(f) and current 3.1(n) do in fact establish an evidentiary presumption. The current rule reads: "A service department finding that injury, disease or death was not due to misconduct will be binding on [VA] unless it is patently inconsistent with the facts and the requirements of laws administered by [VA]." Because the presumption must be consistent with both fact and law, determining whether it has been rebutted requires factual determinations, weighing evidence, and applying the law to those factual determinations. Indeed, the mere process of determining a cause of an injury is quite different from the question presented in a line-of-duty determination, as to which the only relevant inquiry is whether there is a legal bar to VA's adoption of the service department's finding. Here, then, it does make sense for VA to adopt an evidentiary standard.

We note that §§ 3.1(n) and 5.661(f) apply only where there has been a service department finding that would tend to be favorable to a claimant, that is, that a particular injury, disease, or death was not due to willful misconduct. In cases where there has been no such finding, or where the service department found that an injury, disease, or death was due to willful misconduct, VA must review the evidence as it does any other factual issue, and determine whether the preponderance of the evidence shows that the veteran's claimed condition is service connected, with misconduct being one relevant factual question. Cf. Thomas v. Nicholson, 423 F.3d 1279, 1280 (Fed. Cir. 2005) ("concluding that a 'preponderance of evidence' establishing willful misconduct is sufficient to rebut a presumption of service-connection for peacetime disabilities under

§ 105(a)"). Additionally, this pro-claimant presumption is not created by statute, and we are free to establish by regulation an appropriate standard of proof.

In this case, we mean to adopt the elevated "clearly and unmistakably" standard suggested by the commenter. Although the general standard for rebutting a presumption is the preponderance standard (see § 5.3, "Standards of Proof"), in this case, VA is rebutting a finding made by another agency based on that agency's specific review of the veteran's circumstances. Thus, unlike, for example, a presumption that a veteran who served in Vietnam was exposed to herbicides, which applies to all veterans, the service department's willful misconduct finding is particular to one veteran, and is based on the facts of that veteran's case. Therefore, it is appropriate here to raise the evidentiary threshold to rebut that finding.

§ 5.662 Alcohol and Drug Abuse

We propose to delete from the definition of alcohol abuse in § 5.662(a)(1), the requirement that the abuse be "sufficient to proximately cause injury, disease, or death to the person consuming such beverages." The proximate cause requirement is addressed in paragraph (b), and it was redundant to include it in the definition. This makes the definition consistent with the definition of "drug abuse" in paragraph (a)(2), and with the use of the term "abuse of alcohol" throughout the regulation.

§ 5.663 Homicide as a Bar to VA Benefits

One commenter wanted VA to consider mercy killings of terminally ill veterans as a justifiable homicide. This commenter equated a mercy killing with a veteran's suicide. We propose to make no changes based on this comment. Federal law prohibits mercy killings. See 18 U.S.C. Chapter 51, Homicide. As a matter of policy, VA will not make regulations which would encourage anyone to violate Federal law.

One commenter objected to § 5.663(d), noting that many states permit a finding of guilty of homicide where the killing happened during the commission of another crime (the felony murder rule), or where an intoxicated person causes an automobile accident that kills someone else. The commenter suggested that we amend § 5.663(d) to accept only a court of law conviction of intentional homicide as binding on VA.

We agree that such a change would be consistent with § 5.663(a), where we define homicide as "intentionally causing the death of a person without excuse or justification." We therefore propose to insert the phrase, “Subject to the requirement of intent in paragraph (a),” before the phrase, “VA will accept a court of law conviction of homicide as binding” in paragraph (d)(1).

A commenter noted that while we allow insanity as a defense to homicide, we did not define insanity. The commenter urged VA to revise the regulatory language to include all legally permissible excuses for homicide culpability, such as from intoxication, mental immaturity, low intelligence, and other factors. We agree that a regulatory definition of insanity is needed, but we have already provided one elsewhere

in proposed Part 5. In § 5.1, RIN 2900-AL87, General Provisions, 71 FR 16461, Mar. 31, 2006, now proposed § 5.1, we proposed to define “insanity,” as a defense to commission of an act, as meaning a person was laboring under such a defect of reason resulting from injury, disease, or mental deficiency as not to know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity. This definition excuses mental immaturity and low intelligence, as urged by the commenter, to the extent that these qualities prevent the affected person from knowing or understanding the nature or consequences of their act or that what he or she was doing was wrong.

We propose to decline to include intoxication as a legally permissible excuse for homicide in the definition of insanity. Congress, in 38 U.S.C. 105 and 1110, specifically prohibited VA from paying compensation for disabilities due to abuse of alcohol or drugs. It would be inconsistent with Congress' intent if we were to prohibit granting service connection to a veteran because of a disability proximately due to the abuse of alcohol or drugs, but to allow the abuse of alcohol or drugs to be an excuse for homicide or to be included in the definition of insanity for any purpose. While Congress has not prohibited VA from including abuse of alcohol or drugs in our definition of insanity, allowing the abuse of alcohol or drugs to be used as an excuse in those determinations requiring the formation of an intent to do an act would be inconsistent with Congressional intent and VA policy. This is a reasonable gap-filling decision within the Secretary's power under 38 U.S.C. 501(a) to promulgate regulations to carry out the

laws administered by the Department. We therefore propose to make no changes based on this comment.

One commenter asked that VA consider including regulatory language to allow all legally permissible excuses for homicide culpability, reasoning that if intent is required to bar benefits for homicide, a lack of intent for any reason should excuse the homicide and allow eligibility for benefits. As we stated in the proposed regulation, "homicide means intentionally causing death". This language requires that the person who caused the death have the intent to do so, and therefore we propose not to make any changes based on this comment.

One commenter suggested that we accept as binding all court decisions, civil as well as criminal, in § 5.663(d)(1). As explained in the NPRM, we chose to accept as binding a conviction in a criminal judicial proceeding because of the higher standard of proof required for a criminal conviction, which is guilt beyond a reasonable doubt. We noted in the NPRM that this is a higher standard than is applicable in civil matters. As stated in the NPRM, we chose not to use a finding of liability in a civil court proceeding because of the lower standard used in those proceedings. We therefore propose to make no changes based on this comment.

This commenter noted that, in § 5.663(e), concerning the effect of a court of law proceeding on VA findings of insanity at the time of the killing, we did not specify what type of finding must be made. The commenter noted that the finding of insanity could

be expressed as a verdict, for example, not guilty by reason of insanity, or be a finding of fact within the court's decision. In § 5.663(e), we stated, "VA will accept as binding a court's determination that a person was insane at the time of the killing." It is immaterial whether the determination is announced in the verdict or in the body of the written decision. If a court determines the person was insane at the time of the killing, VA will accept that determination in whatever form the court chooses to issue the determination. We propose to make no changes based on this comment.

This commenter then stated that if a court does not make the determination, then VA will need to make the determination. The commenter opined that, that determination should be based on a psychiatrist's objective review and an independent medical opinion, not solely on VA's consultation with a psychiatrist or an opinion from a psychiatrist employed by the VA. While an independent medical opinion is an option we may use when needed, one is not required in all cases. In § 5.92, we explained the situations in which VA will request an independent medical opinion. Absent a medical problem of such obscurity or complexity, or one that has generated such controversy in the medical community at large, we need not solicit an independent medical opinion. VA will determine on a case-by-case basis whether an independent medical opinion is needed for us to decide whether the veteran's actions constituted willful misconduct. As to the requirement of a non-VA psychiatric opinion, VA’s psychiatrists and psychologists are experts, and we have no reason to believe that their opinions are biased against providing benefits to veterans. We propose to make no changes based on this comment because VA has an adequate system for obtaining medical opinions from VA

psychiatrists or psychologists as needed, or obtaining an independent medical opinion when one is needed.

One commenter opposed the § 5.663(c)(2) requirement that the person have “no way to escape or retreat in order to” justify a finding that a killing was in self-defense. The commenter felt that this may create an unjust hardship on claimants and may deprive some claimants of benefits, even though they did not violate their state’s laws or any federal criminal statute. The commenter noted that some states do not require a threatened person to flee and have "stand your ground" laws that allow a person to defend himself or herself without requiring the person to attempt to escape or retreat from the situation.

While some states have enacted “stand your ground” laws, many others have not. We note that, according to Corpus Juris Secundum, “generally, one who seeks to excuse a homicide on the ground of self-defense must show that he did all he reasonably could to avoid the killing; before resorting to the use of deadly force the person attacked must retreat if he or she is consciously aware of an open, safe, and available avenue of escape.” 40 C.J.S. 133 (2008). VA has applied the duty-to-retreat requirement for many years and has not found that it produces unjust results. Moreover, it is appropriate for VA to continue to apply this duty because it is still followed in most jurisdictions.

One commenter was concerned that this regulation does not establish procedures or standards for adjudicating whether the homicide was intentional. This issue would not be adjudicated any differently than any other factual issue presented in a particular case. There are no special procedures applicable to a finding of intentional homicide, and we propose not to adopt any based on this comment.

However, we do propose to make certain revisions based on this comment and our review of this regulation. We have determined that an elevated standard of proof should apply to determinations of intentional homicide because the generally applicable "preponderance of the evidence" standard does not afford the claimant sufficient protection. As noted in the NPRM for this regulation, we accept a criminal conviction as proof that the person convicted did the killing because of the high standard of proof ("beyond a reasonable doubt") used in criminal prosecutions. It is inconsistent with this high standard of proof to require only a preponderance of the evidence to support a finding that a claimant intentionally committed homicide in cases where the claimant was not convicted of such a crime. Thus, we propose to adopt the "clearly and unmistakably" standard of proof in the revised regulation.

Additionally, in initially proposed § 5.663(d)(2), we stated that we will "determine whether the person was guilty" of homicide. But this is not correct. VA does not make determinations of guilt or innocence; VA makes administrative determinations concerning benefit entitlement. Hence, we propose to remove this statement from the regulation.

Additionally, § 5.663(e) stated that “VA will develop the necessary evidence" to determine whether a person is guilty. This instruction was redundant because there are other provisions of part 5 that adequately address the development of claims. We therefore propose to remove the phrase, "will develop the necessary evidence and" from the sentence.

One commenter felt that VA adjudicators were not trained and experienced enough in criminal or tort law to properly adjudicate claims involving homicide. This commenter felt that the regulation was vague and implied that this vagueness violated the due process rights of claimants. The commenter was also concerned that this regulation did not specifically provide for development of evidence except for that relied on in a court hearing. The commenter felt that documentary evidence is inherently hearsay evidence (citing the Federal Rules of Evidence, sec. 801(c)) and was not a proper basis for making a determination of this complexity and gravity, and that VA intended to make a decision based only on a paper or record review. The commenter also noted that the claimant in such a situation lacks the ability to confront an adverse witness under oath. The commenter expressed the opinion that this type of claim may only properly be determined in an adversarial proceeding with formal rules of evidence. For the following reasons, we propose to make no changes based on these comments.

This regulation is an expansion of 38 CFR 3.11, “Homicide”, and incorporates the provisions of 38 CFR 3.11 and long-standing VA procedures for determining entitlement

to benefits when a killing is involved. While it does not include specific provisions for the procedures to be followed in making the determination of whether the claimant intentionally killed another without excuse or justification, the procedures in § 5.90 for developing and adjudicating a claim will be followed. There is no reason to include the procedures in this regulation when they are included elsewhere. Proposed § 5.663 is not intended to be a replacement for any criminal or civil legal proceeding concerning the death of a veteran or other beneficiary and we decline to adopt the standards applicable to a criminal or civil court proceeding. This regulation is not intended to function as a stand-alone regulation but is to be read in conjunction with the other applicable regulations concerning the provision of VA benefits. We propose not to create special provisions for procedures for this type of claim since no special procedures are needed.

We disagree that this regulation is vague. It is very specific concerning what constitutes a homicide, what is an excuse or justification for a homicide, and what impact a homicide has on claimants. The regulation provides specific notice to claimants that a killing that would otherwise provide or increase the killer's benefits, unless excused or with justification, will result in a denial of benefits. This regulation, when applied in concert with the other applicable VA regulations governing provision of benefits, provides full due process rights to the claimant.

We disagree that we will make decisions based only on paper evidence. While documentary evidence is normally what VA uses in adjudicating a claim, every claimant

has a right to a hearing and to present evidence at that hearing. Determinations concerning homicide are not excluded from the right to a hearing and to present testimony and evidence at the hearing. We also disagree that documentary evidence is inherently hearsay evidence and therefore not appropriate for deciding a matter of this complexity and gravity. The Federal Rules of Evidence, in addition to the definition of hearsay cited by the commenter, also provide in sections 803, 804, and 807 exceptions to the hearsay rule. Fed. R. Evid. 803, 804, and 807. Most evidence considered by VA in adjudicating claims falls within one of these exceptions. However, even if the evidence does not fall within one of these exceptions, VA is still required to "consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary." 38 U.S.C. 5107(b).

We also disagree that VA adjudicators are not trained and experienced enough to properly adjudicate claims involving homicide. First, VA adjudicators do not adjudicate claims under criminal or tort laws, so it is irrelevant whether they are trained to adjudicate such matters. VA adjudicators make administrative decisions based on the laws and regulations providing for benefits. Second, VA has an extensive training program for VA adjudicators, which includes training in determining if a killing was a homicide. Additionally, every agency of original jurisdiction has an Office of Regional Counsel available to advise the adjudicators. If criminal or tort law is involved, VA adjudicators may contact the Regional Counsel, or the Office of General Counsel, Office of the Inspector General, or other offices as appropriate, for advice and guidance. We propose to make no changes based on this comment.

In addition to the changes to § 5.663 discussed above, we propose to alphabetically reorder the definitions in paragraph (a) to make them easier to find and to be consistent with similar lists within part 5. Finally, we propose to remove the references to “benefits awarded, but unpaid at death” from § 5.663(f)(6). For the reasons stated in the preamble to § 5.550, and those that follow, we propose not to include that term in part 5.

§ 5.676 Forfeiture for Fraud

Initially proposed § 5.676(b)(5) authorized the suspension of benefits when a case is recommended for forfeiture for fraud, but it did not clearly state the date that the suspension would begin. We propose to revise the rule by adding an effective date that is consistent with current part 3 and the manual provisions in the Manual M21-1MR. We made a similar provision in § 5.677(b)(5), concerning forfeiture for treasonable acts.

§ 5.678 Forfeiture for Subversive Activity

In proposed § 5.678(b)(2)(ii), we propose to change “first day of the month that follows the month for which VA last paid benefits” to “day benefits were suspended”, to improve readability.

§ 5.679 Forfeiture Decision Procedures

One commenter noted a typographic error in § 5.679(b)(6). We propose to correct that error by replacing "Information about that fees" with "Information that fees".

One commenter objected to the term "recommendation for forfeiture" used in both §§ 5.676 and 5.679, observing that the term is not defined. This commenter felt the term, without a definition, is overly broad. We propose to make no changes based on this comment. While the commenter is correct that we do not define the term "recommendation for forfeiture," the term's use in relationship to VA benefits is explained in § 5.679. In this regulation, we explain who may file a recommendation for forfeiture, what the procedures for preparing a recommendation for forfeiture are, and who the official is that will make a decision on the recommendation for forfeiture. This procedure is largely unchanged from the previous regulations and is long-standing VA policy.

The phrase is self-explanatory. Both "forfeiture" and "recommendation" have the meanings commonly assigned them by dictionaries of the English language. We do not propose to define the phrase since there is no need to define the phrase as it is not overly broad or subject to multiple interpretations. We therefore propose to make no changes based on this comment.

One commenter was concerned that § 5.679 would deny the claimant due process of law by suspending payments of any benefits before a final decision has been made on whether to invoke forfeiture. For the following reasons, we propose to make no changes based on this comment.

The forfeiture sections of the new Part 5 regulations, §§ 5.676 and 5.679, do not change VA's procedures for determining forfeiture or for suspending payments for forfeiture. Section 5.676(b)(5) provides that benefits will be suspended if forfeiture for fraud is recommended in accordance with § 5.679. Proposed § 5.679 provides that before a recommendation for forfeiture is made, the recommending Regional Counsel, or in the Philippines, the Veterans Service Center Manager (VSCM), must provide written notice to the beneficiary or claimant of the specific charges against the person, a detailed statement of the evidence supporting the charges, a citation and discussion of the applicable statute, the right to file a statement or evidence within 60 days of the notice, the right to a hearing within 60 days after the notice with representation of the person's choosing, the limitations on fees any representative may charge the beneficiary or claimant, and information that fees for representation are limited and that VA will not pay expenses incurred by a claimant, his or her counsel, or witnesses. Only after all of these procedures are followed will a Regional Counsel, or in the Philippines, the VSCM, make a recommendation for forfeiture. These procedures provide the person subject to the forfeiture with full due process rights.

The commenter also felt that it would be impossible to determine when the suspension of benefit payments would take place since there is no definition of "recommendation for forfeiture". The commenter also asserted that under the proposed rules, it is unclear whether a recommendation for forfeiture is different from a final decision on forfeiture. We propose to make no changes based on these comments.

The date of suspension of benefit payments based on a recommendation for forfeiture is clearly stated in § 5.676(b)(5) (regarding suspension for fraud). Benefit payments will be suspended when the recommendation for forfeiture is filed with the Director of the Compensation Service or personnel of that service designated by the Director to determine whether a claimant or payee has forfeited the right to all VA benefits except insurance payments. The regulation is clear in explaining that the suspension occurs when the recommendation for forfeiture is filed with the appropriate official by Regional Counsel or the Manila VSCM.

Likewise, the regulations are clear in explaining that a recommendation for forfeiture is different from a final decision on forfeiture. Under § 5.679, a recommendation for forfeiture is made by a VA official described in paragraph (a)(2) and the final decision is made by a VA official described in paragraph (a)(1). Nevertheless, to avoid the possibility of confusion on this point, we propose to revise paragraph (a)(2) of § 5.679 by changing the phrase "such official" to "an official described in paragraph (a)(1) of this section".

§ 5.680 Revocation of Forfeiture

In § 5.680(b)(1), we propose to change the sentence, "VA will remit a forfeiture upon a showing that the forfeiture decision involved clear and unmistakable error", to replace the word "involved" with "was the product of", to clearly show the role that the error must have played in leading to the forfeiture decision. This is merely a clarification. We also propose to reorganize the contents of paragraph (b) for clarity.

The term “remission” (the term used in 38 U.S.C. 6103(d)(2) and current VA regulations in part 3) may not be commonly understood by the public and we therefore propose to replace it with “revocation”. We propose to make conforming changes of “remit” to “revoke”.

§ 5.681 Effective Dates: Forfeiture

In paragraphs (b)(1) and (3), we propose to change “starting date” to “effective date”. We do not use the term “starting date” in part 5.

§ 5.683 Renouncement of Benefits

One commenter recommended removing this section because in a situation where the person renouncing the benefit is not the guardian or custodian of the veteran's child, an unjust result may occur and the child may lose benefits.

If a surviving spouse of a veteran is receiving DIC and is not the guardian or custodian of the veteran's child, then the veteran's child's portion of the DIC would have been or would be apportioned to the veteran's child (and paid to the custodian or guardian of the child). The surviving spouse's renouncement of benefits would not affect the amount paid based on the existence of a child. The commenter was incorrect in implying that the renouncement would affect the amount paid based on the existence of a child. We therefore propose to make no changes based on this comment.

As initially proposed, § 5.683(b) stated that a fiduciary may not renounce benefits on behalf of a beneficiary. The main duties of a fiduciary are to preserve and disburse funds that the beneficiary is entitled to receive. However, if a fiduciary is court appointed or a guardian of a minor child, this person may have the authority to act in the stead of the beneficiary and renounce benefits on behalf of the beneficiary, if it is to the beneficiary's advantage. In order to avoid any confusion as to what type of fiduciary is able to renounce benefits on behalf of the beneficiary, we propose to remove the phrase "by a fiduciary" from initially proposed § 5.683(b).

In reviewing initially proposed § 5.683, we noted that it did not address renouncement by a person who VA has determined is entitled, but who is not yet receiving benefits. VA has always permitted such persons to renounce benefits, so we propose to change "beneficiary" to "a person entitled to that benefit" in (b) and (d)(1) to clarify that point.

XVII. Subpart L: Payments and Adjustments to Payments

A. Payments and Adjustments to Payments AM06

In a document published in the Federal Register on October 31, 2008, we proposed to rewrite VA regulations governing payments and adjustments to payments, to be published in new 38 CFR part 5. 73 FR 65212. We provided a 60-day comment period that ended on December 30, 2008. We received a submission from one commenter, National Organization of Veterans' Advocates, Inc.

§ 5.690 Where to Find Benefit Rates and Income Limits

Initially proposed § 5.690 listed benefit programs as a continuous series. To aid readability, we have revised this series to read as two enumerated lists. Paragraph (a) would list the benefits for which VA publishes rates. Paragraph (b) would list the benefits for which VA publishes income limitations.

Although 38 CFR 3.21, from which § 5.690 derives, does not include death compensation in its list of benefits for which VA publishes rates, it has always been VA's practice to publish death compensation rates. We therefore propose to add the term "death compensation" to proposed § 5.690.

§ 5.691 Adjustments for Fractions of Dollars

The commenter stated, "For consistency with section 5.691(b), section 5.691(c) should also require rounding up, rather than down, to the nearest dollar, the amount of Improved Pension or Section 306 Pension payable." Section 5312(c)(2) of title 38 U.S.C., which governs the rounding of the rates and income limitations for the benefits listed in proposed § 5.691(b). It gives the Secretary discretion to round such rates and income limitations in a manner that he or she "considers equitable and appropriate for ease of administration." Another statute, 38 U.S.C. 5123 of title 38 U.S.C. governs rounding of payments of the pension benefits to which proposed § 5.691(c) applies. It prescribes rounding payments down to the nearest dollar. In contrast to section 5312(c)(2), section 5123 does not authorize the Secretary to vary from that practice according to his or her discretion. Because a statute requires that the pension

rates covered in§ 5.691(c) be rounded down, we propose to make no change based on the commenter's suggestion.

§ 5.693 Beginning Date for Certain VA Benefit Payments

The commenter indicated that this section "should provide for payments beginning as of the effective date, rather than as of the first day of the month after the month in which the payment becomes effective." The commenter urged VA to make this change in order to "be consistent with section 5.705 which institutes a reduction or suspension as of the effective date." Pursuant to 38 U.S.C. 5111(a), payment of a VA benefit "may not be made to an individual for any period before the first day of the calendar month following the month in which the award or increased award became effective." Thus, we lack the authority to make the change suggested.

We propose to revise initially proposed §5.693(b). We propose to replace a reference to "payment" with "award or increased award" and add "or increased award" to a reference to "award". We made the former change to correct an error and the latter change to clarify the provision. Further, as initially proposed, the title purported to state the beginning date of certain benefits, but the regulation text actually required the reader to infer the beginning date of payments from the negative statement, "[B]enefits . . . will not be paid for any period before the first day of the month after the month in which the award or increased award becomes effective." This preclusion against paying before a certain time does not inform the reader, or instruct VA, when payments will begin. We propose to state the rule affirmatively: "VA will pay benefits identified in this

paragraph beginning the first day of the month after the month in which the award or increased award becomes effective, except as provided in paragraph (c) of this section."

We propose to revise initially proposed paragraph (c) by restating it in the active voice. We also propose to delete the statement that paragraph (b) does not apply to the benefits listed in paragraph (c). It is unnecessary, because paragraph (b) would already state that it applies, "except" to paragraph (c).

We propose to revise § 5.693(c)(4)(iii) to reflect the terminology used in VA's regulations regarding the reduction of compensation and pension based on the receipt of hospital, domiciliary, or nursing home care. See §§ 5.720 to 5.730. Initially proposed § 5.693(c)(4)(iii) referred to "hospitalization" and "institutionalization". With respect to specific types of VA care or VA facilities, the terms "institution", "institutional", and "institutionalization" are obsolete. Further, reductions based on the receipt of domiciliary care or nursing home care are similar to, and in some instances the same as, reductions based on the receipt of hospital care.

Section 605 of Public Law 111-275, 124 Stat. 2864, 2885-86 (2010), amended 38 U.S.C. 5111 to create a new exception to the general rule on the beginning date for VA benefit payments for veterans who were retired or separated from the active military service for a catastrophic disability. We propose to incorporate this exception into § 5.693 by adding new paragraphs (c)(10) and (e).

§ 5.694 Deceased Beneficiary

In the NPRM AM06, VA inadvertently omitted the provision in current 38 CFR 3.500(g)(1). To correct this, we propose to add this provision as § 5.694. We have renumbered initially proposed § 5.694 as § 5.695, and initially proposed § 5.695 as § 5.696. We also omitted from the initial NPRMs an equivalent to 38 CFR 3.500(g)(3) without an explanation for its exclusion. Section 3.500(g)(3) provides an effective date for discontinuance of an award of "retirement pay" administered by VA upon the death of a veteran. VA no longer administers any veteran's benefit titled "retirement pay." VA previously paid emergency officers' retirement pay and retirement pay under Public Law 77-262, which are no longer active benefits. Although military retirement pay may also be discontinued upon the death of a veteran, VA does not administer that benefit. Therefore, we propose to not include an equivalent to § 3.500(g)(3) in part 5.

§ 5.695 Surviving Spouse's Benefit for the Month of the Veteran's Death

The commenter stated:

> We believe that this section should provide that payments to the surviving spouse will be for the month of death and for the month immediately following the veteran's death. This would provide a more equitable transition for the surviving spouse and would not result in confusion and inadvertent overpayments where a veteran dies during the last days of the month and the notification of the veteran's death does not reach the VA or is not processed until the weeks following death. Eliminating the cost to the VA of attempting to recoup the inadvertent overpayments should cover the costs of the additional month's payments.

The month-of-death benefit is governed by 38 U.S.C. 5111(c) and 5310, and the proposed regulation is consistent with those statutes. Sections 5111 and 5310 do not authorize VA to pay a benefit for both the month of death and the next month unless VA

awards the surviving spouse a death benefit for the month in which the veteran died and the amount of that benefit is less than or equal to the amount of compensation or pension the veteran would have been entitled to for the month of death but for his or her death. Barring this situation, there is no statutory authority for issuing payment for the month of the veteran's death and the month immediately following the veteran's death. We propose to make no change based on the commenter's suggestion.

In initially proposed § 5.694 (b)(2), we used the phrase, "then the surviving spouse is entitled to death pension or DIC for the month of the veteran's death". It is more precise to say, "then VA will pay the surviving spouse death pension or DIC for the month of the veteran's death".

In § 5.695(c), initially proposed as § 5.694(c), we propose to add language to provide that the veteran must have been receiving disability compensation or pension at the time of death for the surviving spouse to be entitled to the month-of-death benefit. Both the authorizing statute, 38 U.S.C. 5310(b)(1), and the current part 3 equivalent, § 3.20(c)(1), require the veteran to have been in receipt of disability compensation or pension at the time of death. Similar language was incorrectly omitted from the initially proposed rule. In § 5.695(c), we also propose to clarify that a provision that was inadvertently omitted from the initially proposed rule (§ 5310(b)) does not authorize a month-of-death benefit for the surviving spouse of a veteran who died on December 31, 1996. In the initially proposed rule, we addressed the deaths of veterans occurring before and after that date but not on that date.

We propose to revise initially proposed § 5.694(d), now § 5.695(d) to clarify that the payment made to a deceased veteran for the month in which the veteran died is a payment of compensation or pension, not "the month-of-death benefit". We propose to make this change because the "month-of-death benefit", defined in § 5.695(a), is "a payment to a deceased veteran's surviving spouse", not a payment to a veteran.

Subsequent to the publication of proposed § 5.695, section 507 of Public Law 112-154 (2012) amended 38 U.S.C. 5310 by making surviving spouses whose spouse died on or after August 6, 2012, entitled to a benefit for the month of a veteran's death if, at the time of the veteran's death: (1) the veteran was receiving disability compensation or Improved Pension, or (2) the veteran is determined to have been entitled to receive such compensation or pension for such month. The amendment also states that if a claim for such benefits was pending on the date of a veteran's death and the pending claim is subsequently granted, any additional benefits for that month would be paid as accrued VA benefits.

§ 5.696 Payments to or for a Child Pursuing a Course of Instruction at an Approved Educational Institution

We have renumbered initially proposed § 5.695 as § 5.696. Initially proposed paragraph (a) defined "approved educational institution". Because that term is already defined in § 5.220(b)(2), we now propose to simply cross reference that definition rather than repeat it in paragraph (a).

We propose to reorganize initially proposed paragraph (b) to enhance clarity and to note the statutory requirement under 38 U.S.C. 1115 that additional disability compensation will only be paid for a qualifying child where the veteran has a service-connected disability rated at least 30 percent disabling.

We propose to reorganize initially proposed paragraph (c), pertaining to payment of dependency and indemnity compensation (DIC) directly to a child, to clarify the relationship between proposed paragraphs (c)(1) and (3). The proposed paragraphs were both derived from current § 3.667(a)(3), which applies to a child pursuing a course of instruction at an approved educational institution upon reaching age 18. Initially proposed paragraph (c)(3) has now been redesignated as § 5.696(c)(1)(i). Initially proposed paragraph (c)(1) has now been redesignated as § 5.696(c)(1)(ii). The distinction between the two paragraphs is that under paragraph (c)(1)(i), the child was a dependent on a surviving spouse's DIC award immediately before the child's 18th birthday. Under paragraph (c)(1)(ii), he or she was not.

As initially proposed, a reference to an exception for paragraph (f)(2) was placed incorrectly in paragraph (g)(1) instead of in paragraph (g)(2). We propose to correct this in paragraph (g). Further, we propose to revise paragraph (g), which pertains to the discontinuance of benefits to a child pursuing a course of instruction at an approved educational institution, consistent with the part 5 convention for describing how VA implements a reduction or discontinuance of benefits.

We propose to add 38 U.S.C. 3562 as the specific statutory authority for § 5.696(i)(1), which bars the payment of Improved Pension, additional disability compensation, and DIC to or for a child pursuing a course of instruction at an approved educational institution who has elected educational assistance under 38 U.S.C. chapter 35.

§ 5.696 Awards of Dependency and Indemnity Compensation When Not All Dependents Apply

As proposed in the NPRM, § 5.696, "Awards of dependency and indemnity compensation when not all dependents apply", pertained only to awards of dependency and indemnity compensation. Therefore, we now propose to renumber it as § 5.525 in subpart G of this part under the undesignated center heading "Dependency and Indemnity Compensation—Eligibility and Payment Rules for Surviving Spouses and Children".

§ 5.697 Exchange Rates for Income Received or Expenses Paid in Foreign Currencies

Initially proposed § 5.697(b) and (c) provided the same general rule and exception to the payment of benefits under subpart J of this part and under § 5.551(e). The same general rule and exception also apply to funds paid in accordance with §§ 5.565(b)(4), 5.566(d)(4), and 5.567(a)(4). Therefore, we propose to combine initially proposed § 5.697(b) and (c) into paragraph (b) and expand the applicability of paragraph (b) to include the payment of these other funds. We also propose to make

changes to the general rule and the exception, paragraphs (b)(2) and (3) respectively, to improve readability or simplify language.

Also in new § 5.697(b), we propose to clarifylanguage from initially proposed paragraph (c). In initially proposed § 5.697(c), we used the phrase "last illness and/or burial". Title 38 U.S.C. 5121(a)(6) states, "[A]ccrued benefits may be paid . . . to reimburse the person who bore the expense of last sickness and burial." VA interprets the word "and" as used in the statute to mean "or". We do not believe that Congress intended to require that a person have paid expenses of both the last illness and burial to qualify for some reimbursement. For example, if a person expended his or her savings paying for health care bills resulting from the veteran's last illness and therefore could not pay for the burial, it would be unfair not to reimburse him or her for the health care bills. We propose to change the proposed language from "and/or" to simply "or" because this term includes "and". Furthermore, this change is consistent with current § 3.1000(a)(5), which uses the phrase "last sickness or burial".

§ 5.705 General Effective Dates for Reduction or Discontinuance of Benefits

The commenter indicated that for "similar reasons as what is now proposed section 5.694 [now proposed 5.695], the effective date for reduction or discontinuation of benefits should be the month following the triggering event for the reduction or discontinuance." The effective dates for reductions and discontinuances are governed by 38 U.S.C. 5112. Under section 5112, in most circumstances reductions and discontinuances of disability compensation, pension, or dependency and indemnity

compensation must be on the last day of the month in which a described event occurs. We note as well that the effect of this rule is that any new benefit that may be paid as a result of the reduction or discontinuance, such as a newly elected but exclusive benefit or a benefit to a survivor or an apportionee, can be paid in the month immediately after the month in which the benefit is reduced or discontinued. Moreover, VA reduces or discontinues benefits only when the beneficiary is no longer entitled by law to receive the benefits. The commenter's suggestion is that we continue to pay such benefits for a full month after we determined that the beneficiary is not entitled to receive them. We have no authority to adopt the commenter's suggestion.

§ 5.707 Deductible Medical Expenses

Section 5.707 describes the medical expenses that VA will deduct for purposes of three of VA's benefit programs that are based on financial need. Paragraph (c) lists six categories of such expenses and then lists subcategories within some of them. Certain expenses may fall within more than one category or subcategory. In order to ensure that VA makes decisions that grant every benefit that the laws supports, we have added to the introductory text of paragraph (c), "If there is more than one way to categorize a medical expense under this paragraph (c), VA will categorize it in the way that is most favorable to the claimant or beneficiary." See 38 CFR 3.103(a) ("[I]t is the obligation of VA . . . to render a decision which grants every benefit that can be supported in law."); see also 71 FR 16475, Mar. 31, 2006 (proposed 38 CFR 5.4(b), based on 38 CFR 3.103(a)).

As initially proposed, the text of paragraph (c)(1) listed care typically provided by a licensed health care provider but failed to specify that in order for payments for the care to be deducted as medical expenses under paragraph (c)(1), the care must have been provided by a licensed health care provider. That requirement was intended in the proposed rule, as shown by the heading of paragraph (c)(1), "Care by a licensed health care provider"; nevertheless, we propose to add the requirement to the text of the paragraph for clarity.

In initially proposed § 5.707(c)(4), we specified the mileage rate for deductible medical expenses as 20 cents per mile traveled. Following the publication of the proposed rule, VA raised that mileage rate. VA publishes that mileage rate on VA Form 21-8416, Medical Expense Report, which is updated periodically. In order to ensure that the public has the most current information, we propose to change § 5.707(c)(4) to refer to "the amount stated on VA Form 21-8416, Medical Expense Report" rather than a specific rate. We also inform the reader that this form is available on the VA website.

Initially proposed § 5.707(c)(6) began, "The following payments are 'medical expenses' that will be deducted from income:". We determined that this introductory language is redundant because it is already stated in the introductory text of paragraph (c): "The following payments are 'medical expenses' that will be deducted from income if they are not reimbursed". We therefore propose to remove the introductory language from paragraph (c)(6).

We further propose to revise paragraph (c)(6) to more accurately describe current VA practice. In paragraph (c)(6)(ii), regarding payments for an in-home attendant, we propose to clarify the circumstances under which the attendant must be a licensed health care provider. We also propose to remove the initially proposed language that states that the attendant may be a family member. Although the proposed language was accurate, it was superfluous, and including the language might confuse a reader regarding whether the attendant could be someone from another general class, such as a friend or a neighbor.

In paragraph (c)(6)(iv), regarding payments for custodial care, we propose to delete language providing that payments made strictly for custodial care were not deductible. That language does not accurately describe VA's practice. Payments for custodial care (including room and board) are deductible if the other requirements of the paragraph are met. We also propose to add conditions that clarify the circumstances under which the paragraph permits described payments to be deducted as medical expenses.

In paragraph (c)(6)(v), regarding payments for custodial care in a government institution, we propose to add conditions to clarify the circumstances under which the paragraph permits described payments to be deducted as medical expenses.

In paragraph (c)(6)(vi), regarding payments to an adult day care facility, rest home, group home, or similar facility, we propose to delete initially proposed language

stating that if the individual is not in need of regular aid and attendance and is not housebound, VA will deduct all reasonable fees paid to the facility, but only to the extent that they are for medical treatment provided by a licensed health care provider. Such language is unnecessary in paragraph (c)(6)(vi) because payments for medical treatment provided by a licensed health care provider are always deductible under paragraph (c)(1).

We also propose to delete paragraph (c)(6)(vi)(C), which provided that if the adult day care or similar facility was a government facility, paragraph (c)(6)(v) applied. The proposed revisions to paragraph (c)(6) clarify the circumstances under which each of the paragraphs applies in order to be consistent with and accurately describe VA's current practice. More specific direction is unnecessary and could be confusing or inaccurate. As discussed above regarding the introductory text of paragraph (c), to the extent that the categories and subcategories of medical expenses in paragraph (c) may overlap, VA will always categorize a medical expense in the way that is most favorable to the claimant or beneficiary.

We also propose to make a few changes to initially proposed § 5.707 to improve readability or simplify language.

§ 5.708 Eligibility Verification Reports

Initially proposed § 5.708(a) incorrectly referred only to Improved Pension and parents' dependency and indemnity compensation (DIC). We propose to revise

§ 5.708(a) to clarify that eligibility verification reports (EVRs) pertain to all three VA pension programs—Old-Law Pension, Section 306 Pension, and Improved Pension—as well as parents' DIC.

Initially proposed § 5.708(b)(1) incorrectly indicated that VA may require claimants to complete an EVR annually. Only beneficiaries may be required to file an EVR annually. We have deleted the term "annually" from § 5.708(b)(1).

Initially proposed § 5.708(c) incorrectly implied that certain parents receiving parents' DIC were never required to file an EVR. Paragraph (c) should have made clear that it was an exception to the general requirement that such parents file an EVR annually. Accordingly, we propose to delete initially proposed paragraph (c) and place the material proposed in paragraph (c) in a note to revised paragraph (b)(2)(i) pertaining to the requirement for beneficiaries to file an EVR annually. We have not included in that note the sentence from initially proposed paragraph (c) stating, "However, a parent receiving parents' DIC must notify VA whenever there is a material change in his or her annual income." That sentence is unnecessary given that similar information is provided in §§ 5.708(b)(2)(ii) and 5.709. In the note to paragraph (b)(2)(i), we propose to add two more groups who are exempted from the annual EVR requirement, beneficiaries of Old-Law Pension and Section 306 Pension and certain beneficiaries of Improved Pension. This change is consistent with current practice and facilitates VA's efficient administration of these programs.

The third sentence of initially proposed paragraph (d), redesignated as paragraph (c), described the action VA takes when expected income is uncertain. The sentence referred to other more specific provisions elsewhere in part 5. In order to avoid confusion about the purpose and meaning of the sentence, as well as its relationship to the first sentence in the paragraph, we propose to delete the sentence and provide instead a clear cross reference to the relevant specific provisions to which the deleted sentence referred. We also propose to clarify the cross reference to § 5.478 to describe more accurately the circumstances under which that provision applies. The initially proposed language described § 3.260(b), upon which § 5.478(a) is based, but it would not accurately describe the content of § 5.478(a).

We propose to clarify § 5.708(e)(2), redesignated from initially proposed paragraph (f)(2). As initially proposed, the paragraph stated that VA would notify a beneficiary that an EVR was incomplete and inform the beneficiary of the information needed to complete the EVR. We have simplified the paragraph. If VA notifies a beneficiary of additional information needed to complete an EVR, it is implicit in that notice that the EVR, as filed, is incomplete.

We propose to clarify initially proposed § 5.708(g)(1)(ii) and redesignate it as initially proposed paragraph (f)(1)(ii). As initially proposed, the rule was limited to instances in which the discontinuance of payments was effective before the date on which benefits were suspended. Such a limitation on the rule is misleading. Whether or not discontinuance of benefits was effective before the date on which benefits were

suspended is irrelevant; in either case, the effective date of resumption under this paragraph is the date the benefits were discontinued. This change is consistent with current practice.

Initially proposed § 5.708(h), redesignated as § 5.708(g), stated, "A former beneficiary who owes or owed money to VA because VA discontinued payments for failure to file an EVR within the time limit . . . may submit the EVR at any time", and further stated, "If, based on information in the EVR, VA decides that the former beneficiary was entitled to benefits for any part of the period of time in which payment had been discontinued for failure to file an EVR, VA will offset the debt for that part of the period." We have determined that in some instances, a former beneficiary might file a new claim after VA has discontinued his or her benefits. If such a claim were granted, that person would become a current beneficiary. Nevertheless, he or she might still file the previously requested EVR, which could reduce or eliminate the debt. Therefore, in contemplation of that scenario, we propose to add the term "beneficiary" before "former beneficiary" in each sentence where "former beneficiary" was initially proposed.

We also propose to clarify paragraph (g) to state that an EVR may be accepted for purpose of reducing or eliminating a debt. Finally, to be consistent with the rest of the paragraph, we propose to replace "offset" with "reduce" and "completely offset" with "eliminated". The new terms more accurately describe the action that VA takes and are easier for the public and VA personnel to understand.

§ 5.710 Adjustments in Benefits Due to Reduction or Discontinuance of a Benefit to Another Payee

Section 5.710 was initially proposed as a plain language rewrite of current § 3.651. For clarity, we propose to revise § 5.710 to describe more specifically the procedures VA uses to adjust awards of benefits that result from the reduction or discontinuance of the same benefit to another payee. Initially proposed § 5.710(b) referred to VA requesting information or evidence but failed to explain when or why VA would make such a request. We propose to revise paragraph (b) to explain that if there is sufficient information and evidence for VA to award or increase the benefit to the payee, then VA will do so. If there is not, then VA will request additional information or evidence. We also clearly state the effective date rules for the various scenarios.

§ 5.711 Payment to Dependents Due to the Disappearance of a Veteran for 90 Days or More

Like current § 3.656(a), initially proposed § 5.711 provided that when a veteran who was receiving or entitled to receive disability compensation, Section 306 Pension, or Improved Pension disappears for 90 days or more, benefits will be paid to the veteran's dependent(s). However, neither the current rule nor the initially proposed rule defines the term "entitled to receive". The relevant statutory authorities only refer to a veteran who is "receiving compensation" (38 U.S.C. 1158) or "receiving pension" (38 U.S.C. 1507). VA has interpreted such statutory language liberally so that "under certain circumstances" actual physical receipt of the benefit is not required. See VAOPGCPREC 7-91, 56 FR 25156 (June 3, 1991); see also VAOPGCPREC 21-92, 58

FR 12449 (Mar. 4, 1993) ("Certain opinions interpreting the terms 'receiving' or 'in receipt' of compensation or pension as found in . . . portions of title 38, United States Code . . . have . . . recognized limited exceptions to the literal meaning of the terms."). Consistent with that interpretation, we propose to add a definition of the term "entitled to receive" in paragraph (a): "For purposes of this section, entitled to receive means that VA has granted a claim for one of the benefits listed in paragraph (a)(1) of this section but has not yet paid the veteran."

We propose to revise initially proposed paragraphs (b) and (c), which provided similar rules, to refer to the "rate" of payment rather than the "amount" of a payment to be more consistent with terminology actually used by VA personnel. We also propose to revise these paragraphs, so that the rules are phrased similarly. In these paragraphs, we also propose to delete the initially proposed phrases "for benefits under this section" and "for benefits" in reference to a claim for benefits under § 5.711. We had used (or not used) the phrases inconsistently in initially proposed § 5.711. The uses of "claim" to refer to a claim for benefits under § 5.711 are clear in context without the deleted phrases.

We propose to add a note to initially proposed paragraph (b)(1), which states, "Note to paragraph (b)(1): If there is a dependent parent, then the rate for parents' DIC may vary depending on the parent's annual income." By law, the amount payable for parents' DIC is based on the parent's annual income. This is different from other DIC

programs, which are not income-based. We propose to add the note to ensure that readers are aware of this distinction.

In initially proposed § 5.711(b)(1)(ii), we stated, "If VA pays disability compensation pursuant to this paragraph, then it will pay benefits in equal amounts to the dependents." However, on further review, we note that 38 U.S.C. 1158 does not permit such an equal distribution of benefits. Rather, it states that, payments to each dependent "shall not exceed the [rate of DIC] payable to each if the veteran had died from service-connected disability." If benefits were distributed equally, it is likely that the rate payable to some dependents would exceed the rate authorized by the statute. Accordingly, we propose to revise § 5.711(b)(1)(ii) to remove the provision regarding "equal amounts". In its place, we propose to provide that VA will pay benefits to each dependent in the same proportion as if the DIC rate were being paid. Although this revised method is more complex than the method we initially proposed, it is fair to the dependents, and it complies with section 1158 because the rate payable can never exceed the maximum rate authorized by that statute.

We propose to add two paragraphs, (c)(1)(i) and (ii), to initially proposed § 5.711(c) so that it is organized like § 5.711(b). For the same reason we have used a proportional formula for compensation benefits in paragraph (b)(1)(ii), we propose to add paragraph (c)(1)(ii) stating that pension paid under paragraph (c) at the veteran's rate will be paid using the proportional formula. Like 38 U.S.C. 1158 discussed above, 38 U.S.C. 1507 states, "Where a veteran receiving pension . . . disappears, the

Secretary may pay the pension otherwise payable to such veteran's spouse and children . . . Payments made to a spouse or child under this section shall not exceed the amount to which each would be entitled if the veteran died of a non-service-connected disability." The proportional payment method is fair to the dependents, and it complies with section 1507.

Initially proposed § 5.711(d)(1) stated the effective date for the discontinuance of payments to a veteran's dependent(s), as a result of the veteran's whereabouts being known. However, initially proposed paragraph (d)(2) did not provide information about the effective date for the discontinuance of the dependent's benefits if the veteran is presumed dead. We propose to correct this omission by stating that the date of the veteran's death is presumed to be 7 years after the date the veteran was last known to be alive. This is consistent with the provisions of paragraph (b) of § 5.503, "Establishing the date of death", as well as the statute, 38 U.S.C. 108. We also propose to add a reference to § 5.694, which provides the effective date for the discontinuance of benefits based upon the death of a beneficiary.

§ 5.712 Suspension of VA Benefits Due to the Disappearance of a Payee

In § 5.712(a), we propose to add the effective date for the suspension of benefits. Paragraph (a) would state that upon the disappearance of a payee, benefits will be suspended effective the first day of the month after the month for which VA last paid benefits to the payee. This revision is based on current § 3.500(t).

§ 5.713 Restriction on VA Benefit Payments to an Alien Located in Enemy Territory

Initially proposed § 5.713(a) did not provide an effective date for discontinuance of benefits due to an alien being located in an enemy territory. We propose to correct this omission by adding a sentence stating that "VA will discontinue benefits to an alien located in territory described in this paragraph (a) of this section, effective the first day of the month after the month for which VA last paid benefits." This statement is consistent with current VA practice, as well as the statute 38 U.S.C. 5308(a), which requires VA to discontinue benefits "forthwith".

§ 5.714 Restriction on Delivery of VA Benefit Payments to Payees Located in Countries on Treasury Department List

Initially proposed § 5.714(a)(1) defined "payee" (for purposes of part 5) as a person to whom a VA benefit check is payable. However, § 5.1 defines "payee" as "a person to whom monetary benefits are payable." We believe that the general definition of "payee" in § 5.1 properly defines "payee" for purposes of § 5.714. Having two different but very similar definitions of "payee" in part 5 might cause confusion, so we propose to remove the definition from § 5.714.

§ 5.715 Claims for Undelivered or Discontinued Benefits

We propose to change "may" in initially proposed § 5.715, referring to claims for undelivered or discontinued benefits, to "must" in paragraph (b)(1) to clarify that filing a claim is necessary for the payment of benefits under § 5.715. In initially proposed § 5.715(b)(1), we had restated the provisions of § 3.653 using "may" because a claim

need not be filed by a payee who requests the alternative means of delivery under § 5.714(d). In using "may", we unintentionally suggested that filing a claim was permissive, not mandatory. We propose to revise § 5.715(b)(1) to clearly state that a claim is necessary unless the exception for alternative means of delivery applies. We also propose to clarify paragraph (b)(1) to specify that, for benefits discontinued under § 5.713, the paragraph applies to both the retroactive restoration of benefits not paid and the prospective resumption of benefits.

In initially proposed § 5.715(b)(2), we stated, "There is no time limit for filing such a claim." We have determined that it is unnecessary to state this negative proposition and this language might mislead readers into believing that there is an unstated time limit for filing claims under other sections, when in fact there is no such time limit. Accordingly, we propose to delete proposed paragraph (b)(2).

Initially proposed paragraphs (b)(3)(ii) and (iii) respectively stated that amounts that were not delivered under § 5.714 will be released or a discontinued benefit resumed only if "the payee is no longer subject to the restriction in § 5.714(c)" or "the country in which the payee is located is removed from the Treasury Department list". We have determined that with regard to any payee described in paragraph (b)(3)(iii), paragraph (b)(3)(ii) would have the same effect. Any payee described in paragraph (b)(3)(iii) would by definition no longer be subject to the restriction in § 5.714(c), which only applies if a payee is located in a country on the Treasury Department list. Paragraph (b)(3)(ii) (which we propose to redesignate as (b)(2)(ii)) encompasses other

scenarios in addition to the one addressed in initially proposed paragraph (b)(3)(iii). Therefore, we propose to delete initially proposed paragraph (b)(3)(iii) as unnecessary.

§ 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

Our proposal to rewrite the VA regulations governing hospital, domiciliary, and nursing home care reductions and resumptions in new 38 CFR part 5 (proposed §§ 5.720 – 5.730) was included in a document published in the Federal Register on January 14, 2011, that also proposed to rewrite VA regulations governing apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries. 76 FR 2766. We provided a 60-day comment period that ended on March 15, 2011. We received submissions from four commenters; however, only the submission from the National Organization of Veterans' Advocates, Inc., pertained to the regulations governing hospital, domiciliary, and nursing home care reductions and resumptions.

Concerning initially proposed § 5.720, one commenter stated that the language in current 38 CFR 3.556(f) defining a "regular discharge" as occurring when the veteran has "received maximum hospital benefits" is clearer than the new language in § 5.720(a)(3), i.e., when "there is no medical reason to continue care." The commenter asserted that the proposed definition is problematic because it "could interject administrative or budget issues into what is intended to be a medical decision concerning necessary and reasonable medical care."

We disagree that our proposed definition would have the effect suggested by the commenter. To the contrary, we have clarified that a "medical professional" must make the determination, and we specify that the decision must be based on whether there is a "medical reason" to continue care. Our proposed language would reduce, not increase, the risk that the commenter describes. We therefore propose to make no change based on this comment. More fundamentally, we note that neither current § 3.556(f), nor initially proposed § 5.720(a)(3) or (4), regulate the practice or procedures of VA medical staff regarding the discharge of patients. Rather, they are intended to guide VA Regional Offices staff in determining how to adjust benefits when a beneficiary is receiving hospital, domiciliary, or nursing home care.

Current 38 CFR 3.556(f) defines "irregular discharge" as "[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". In initially proposed § 5.720(a)(4), we merely restated these reasons in an easier to read format. The commenter urged that we revise our definition to:

> incorporate language which reflects actions indicative of intentional and unreasonable refusal of treatment such as "refusal to accept reasonable and necessary treatment, which refusal is not the result of a mental condition," "intentional and unreasonable neglect of treatment, which is not the result of a mental condition," "intentional and unreasonable obstruction of treatment, which is not the result of a mental condition," "refusal to accept medically indicated transfer to another facility, which is not the result of a mental condition," and "intentional and unreasonable failure to return from unauthorized or authorized absence, which is not the result of a mental condition."

The commenter asserted these changes are "especially important in view of the large number of VA patients who suffer from organic brain damage or mental illness and whose symptoms might include being resistant to treatment."

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, because proposed § 5.720(a)(4) is merely a restatement of the current regulations, the comment is outside the scope of this rulemaking.

§ 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

Initially proposed § 5.721(b) stated:

> *Discharge or release.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.720 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

One commenter urged VA to revise this paragraph to require "clear and convincing evidence" to resume benefits at a lower rate than the rate which had been in effect prior to the reduction or discontinuation. We note that pursuant to the language "unless the evidence of record shows that a different rate is required" (which we also use in §§ 5.721(b), 5. 725(c)(1) and (2), 5.729(d)(1), and 5.730(c) and (d)), VA might

increase or reduce a beneficiary's payment. Such a change would be based on a change in disability level or income, or other relevant factors. The change might be based on newly discovered evidence or the discovery of clear and unmistakable error in a prior decision. (In a reduction case, VA would of course comply with all applicable regulations concerning due process before making a reduction.) Since there are different situations where VA might change benefit payments, and these could involve various standards of proof, it would be erroneous to specify one standard of proof here. Moreover, in part 5 we have stated the default standards of proof in § 5.3 and the other standards in the appropriate specific sections (e.g., clear and unmistakable error in § 5.162). We therefore propose to make no change based on this comment.

§ 5.723 Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.

Section 3.551(i) states, "Effective November 5, 1990, and terminating on September 30, 2011, 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." Section 601 of Public Law 111-275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 5503(d)(7) to extend that delimiting date through May 31, 2015, but we inadvertently failed to include the new date in initially proposed § 5.723(a). Subsequently, section 262 of Public Law 112-56 (2011) amended 38 U.S.C. 5503(d)(7) to extend that delimiting date through September 30, 2016. Subsequent to that, section 203 of Public Law 112-260

extended the date to November 30, 2016. We propose to update paragraph (a) to reflect this most recent amendment.

We also propose to add "surviving child" where appropriate in § 5.723 to state that the Medicare reduction pertains to a surviving child claiming or receiving pension in his or her own right, as required by section 601 of Public Law 111-275, 124 Stat. 2864, 2884 (2010).

B. Payments to a Beneficiary Who is Eligible For More Than One Benefit

In a document published in the Federal Register on October 2, 2007, we proposed to establish in a new 38 CFR part 5 VA regulations governing payments to beneficiaries who are eligible for more than one benefit, based on regulations currently contained in 38 CFR part 3. 72 FR 56136. The title of this proposed rulemaking was, "Payments to Beneficiaries Who Are Eligible for More than One Benefit" (RIN: AL95). We provided a 60-day comment period that ended on December 3, 2007. We received one comment from a member of the general public.

§ 5.740 Definitions Relating to Elections of Benefits

In initially proposed § 5.740(a), we stated: "Election means any writing, signed by a person authorized by § 5.741, 'Persons who may make an election,' expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled." This language may confuse

the concept of what an election is with the concept of who may file an election. An election is the written expression of choice. However, VA will only "accept" elections in accordance with § 5.741. We therefore propose to remove the language, "signed by a person authorized by § 5.741, 'Persons who may make an election,'" from this section. For the same reason, we propose to remove all references to § 5.741 from § 5.740.

§ 5.742 Finality of Elections of Benefits; Cancellation of Certain Elections

The election finality rules in 38 CFR part 3 pertain to reelections as well. To ensure that this concept is clear in part 5, we propose to add to the introductory paragraph on § 5.742, the sentence, "Reelections are subject to the finality rules stated in paragraphs (a) through (e) of this section."

When provisions similar to proposed § 5.742(d) and (e) were previously proposed as § 5.461(b)(2) and (3), they provided that a request to cancel the election must be received within 1 year from the date that the election had become effective. Following internal reconsideration of this provision, we have determined that this limitation might be overly narrow in some cases. Therefore, we now propose that § 5.742(d) and (e) contain no such limitation.

§ 5.743 General Effective Dates for Awarding, Reducing, or Discontinuing VA Benefits Because of an Election

In initially proposed § 5.743(a)(1), we stated:

> Unless otherwise provided in this part, when a claim is pending and an election is timely filed under § 5.740(d), the effective date for an award of

an elected benefit shall be the same as the effective date VA would assign for the awarded benefit if no election were required.

We have determined this paragraph can be shortened by removing the phrase “when a claim is pending and an election is timely filed under § 5.740(d)”.

§ 5.745 Entitlement to Concurrent Receipt of Military Retired Pay and VA Disability Compensation

In § 5.745(a), we propose to clarify the references to “the Coast and Geodetic Survey” (C&GS) and “the Environmental Science Services Administration” (ESSA), because both entities became part of the National Oceanic and Atmospheric Administration (NOAA). See Reorganization Plan No. 4 of 1970, July 9, 1970. See Dane Konop, "175 years of service to the Nation: The History of NOAA's National Ocean Survey—1807-1982." (Editor's Preface to the 1981 National Ocean Survey Annual Report). May 1982. Unpublished. We therefore propose to revise initially proposed § 5.745(a) to refer to NOAA, “(including its predecessor agencies, the Coast and Geodetic Survey and the Environmental Science Services Administration).”

In the proposed rulemaking, we stated in proposed § 5.745(c)(1)(ii) that, “For veterans receiving disability compensation based on a VA determination of individual unemployability, the phase-in period ends on December 30, 2009.” According to statute 10 U.S.C. 1414, this phase-in period actually ends on September 30, 2009. We intend to correct paragraph (c)(1)(ii) to accurately reflect the statute.

We propose to revise the various provisions of § 5.745 regarding entitlement to full concurrent receipt of military retired pay and veterans disability compensation based on a VA determination of individual unemployability (IU). These proposed revisions are intended to implement section 642 of the National Defense Authorization Act of 2008, Public Law 110-181, 122 Stat. 3, 157 (2008), which provides that veterans who are entitled to receive veterans disability compensation based on a VA determination of IU are no longer subject to a phase-in period. On March 16, 2009, VA published a final rule that amended 38 CFR 3.750 by removing language that made veterans who receive disability compensation based on a VA determination of IU subject to a phase-in period. See 74 FR 11646. To avoid confusion, the final rule also made changes that clarified that both veterans who are rated 100 percent disabled under the VA rating schedule and veterans who are entitled to receive 100 percent disability compensation based on a VA determination of IU do not need to file a waiver of military retired pay. The proposed revisions of § 5.745 are therefore necessary to incorporate the amendments to § 3.750 outlined in 74 FR 11646.

In initially proposed § 5.745(d)(2), we stated that, “An election filed within 1 year from the date of notification of VA entitlement will be considered as ‘timely filed’ for effective date purposes.” We are concerned that this provision could be read out of context to apply to all elections. Because it applies only to elections involving military retired pay and VA disability compensation, we propose to insert the phrase, “between military retired pay and disability compensation under this section that is” after “An election” in the above-quoted sentence. Similarly, we note that the preamble to initially

proposed § 5.740 cited § 3.750(b) for the definition of a "timely filed" election; however, § 3.750 was amended on November 20, 2006. See 71 FR 67061. That rulemaking did not change the definition of "timely filed", but it redesignated the paragraphs in that section so that the correct citation to the definition of "timely filed" should have read § 3.750(d).

§ 5.746 Prohibition Against Receipt of Active Military Service Pay and VA Benefits for the Same Period

The commenter requested that the proposed regulation address situations where a veteran who is receiving VA disability compensation fails to notify VA when he or she returns to active duty and is later assessed with an overpayment due to the prohibition against concurrent receipt of active military service pay and VA disability compensation. In the commenter's example, a veteran receiving VA disability compensation benefits returned to active duty for two periods of service but never informed VA. He continued to receive VA disability compensation benefits during these active duty periods and for several years after discharge, at which time he notified VA of his return to active duty. The commenter said that the VA regional office, citing 38 CFR 3.654(b)(2), discontinued the veteran's disability compensation retroactively to the date of the veteran's first return to active duty, which resulted in a large overpayment. Moreover, the regional office did not reestablish entitlement to disability compensation after the veteran's discharge but before his second period of active duty because the veteran had not requested that VA do so. According to the commenter, because the veteran had continued to receive his disability compensation during his return to active military service, he obviously had no

reason to request reinstatement of that compensation. The commenter said VA should have only created an overpayment in the veteran's account for the period he/she was actually receiving both active military service pay and VA disability compensation benefits. The commenter also felt that VA and the Department of Defense should do a better job in working together to ensure these types of cases do not occur. The commenter noted that VA benefits are intended to be dispersed in a clear and consistent manner and a veteran should not be adversely affected by creating an overpayment for periods the veteran is not receiving both active military service pay and VA disability compensation benefits.

For the following reasons, we propose not to make any changes based on this comment. First, we note that when VA awards disability compensation, VA regularly instructs veterans to inform VA if they return to active duty, so that VA can properly adjust their benefits. Moreover, VA annually sends letters to all veterans receiving disability compensation notifying them whenever there is a legislative increase in the amount of their benefits for the following year. In that letter, we remind them to inform VA if they return to active duty, so that VA can properly adjust their benefits. Thus, veterans are clearly informed of their duty to notify VA.

Second, the types of cases described by the commenter are very rare. This is because, in light of the procedures described above, most veterans notify VA in advance of their return to active duty in order to avoid an overpayment. Moreover, VA exchanges data with the Department of Defense, showing which veterans have

returned to active duty, on a quarterly basis. VA uses this information to discontinue the disability compensation of any veteran who failed to notify VA in advance. It is not clear why this did not happen in the particular case described by the commenter, but, again, this type of oversight is very rare.

Third, VA may waive an overpayment when collection would be against "equity and good conscience". See 38 CFR 1.965. This relief was apparently provided to the veteran described by the commenter. For these reasons, we respectfully propose to decline to make any changes based on this comment.

§ 5.747 Effect of Military Readjustment Pay, Disability Severance Pay, and Separation Pay on VA Benefits

Proposed paragraph (a) of § 5.747 informs the reader when lump-sum readjustment pay is available to a veteran. We propose to change "on or after September 15, 1981" to "after September 14, 1981" in order to conform to the format generally used for dates throughout part 5.

In addition, we propose to add § 5.747(b)(3) to implement the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, sec. 1646(b), 122 Stat. 3. Public Law 110-181 amended 10 U.S.C. 1212 to provide that no deduction may be made from VA disability compensation for disability severance pay received for disabilities incurred in a combat zone or in combat-related operations as designated by the Department of Defense (DoD). Also, initially proposed § 5.747(b) and (d) included

as an authority citation, 10 U.S.C. 1212(c). This citation is no longer accurate based on the changes enacted by Public Law 110-181. We propose to correct the authority citations in § 5.747(b) and (d) to correctly reflect 10 U.S.C. 1212(d).

In initially proposed § 5.747(d), concerning recoupment from VA disability compensation for veterans who received lump-sum readjustment pay, disability severance pay, separation pay, or special separation pay, we inadvertently omitted language which appears in 38 CFR 3.700(a). We now propose to add the language to § 5.747.

§ 5.750 Election Between VA Benefits and Compensation Under the Federal Employees' Compensation Act for Death or Disability Due to Military Service

Initially proposed § 5.750(a)(1) described an election as "irrevocable". To be consistent with the other sections in this subpart using the term "irrevocable", and to ensure clarity, we propose to add the parenthetical "(there is no right of reelection)" to this paragraph.

§ 5.757 Elections Between VA Disability Compensation and VA Pension

Initially proposed § 5.757(b) stated " A person who is entitled to receive both death compensation and death pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, . . . " The reference to death compensation here refers to dependency and indemnity compensation (DIC). Once a spouse or parent elects out of death compensation, they cannot elect back into the

program because DIC has replaced death compensation. We therefore propose to change the term “death compensation” with “dependency and indemnity compensation”.

We propose to add the phrase “at any time” in the first sentence of § 5.757(c), so that it now reads, “A person who is entitled to receive both disability compensation and Old-Law Pension or Section 306 Pension may elect at any time to receive either benefit.” This is necessary to clarify that, consistent with current § 3.701(a), there is no time limit for either election or reelection under this paragraph.

Initially proposed § 5.757(f) omitted an exception to the rule of elections between VA benefits, found in § 3.666(d). Such exception states that “an election to receive disability compensation in lieu of pension is not required for an incarcerated veteran who does not have a dependent spouse or child.” We propose to correct this omission by adding § 5.757(f)(2).

§ 5.760 Electing Improved Death Pension Instead of Dependency and Indemnity Compensation

Initially proposed § 5.760 stated that a surviving spouse who is entitled to receive dependency and indemnity compensation (DIC) may elect to receive Improved Death Pension instead of DIC. However, it did not explicitly state that the election was revocable. Generally, all elections are revocable unless specifically stated otherwise. To clarify this point, we propose to add the sentence, “Such surviving spouse may subsequently reelect either benefit” to this section.

§ 5.762 Payment of Multiple VA Benefits to a Surviving Child Based on the Service of More than One Veteran

Initially proposed § 5.762(c)(4) stated that a child has the right to elect or reelect one or more times to receive benefits based on the death of either parent in the same parental line. We propose to remove the phrase "one or more times" because it is unnecessary and possibly confusing in light of the general rule that there is no limit on the number of times a person may reelect a different benefit. However, this general rule is subject to exceptions stated in certain sections in this subpart.

§ 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA Death Pension or Dependency and Indemnity Compensation for the Same Period

In initially proposed § 5.764, "Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period", we proposed to restate current § 3.707(a) and (b) and add the statement that a child who is eligible for death pension and dependents' educational assistance (DEA), "must elect between VA death pension and DEA". We now propose to consolidate the rule on dependency and indemnity compensation (initially proposed § 5.764(a)(1)(i)) with the rule on death pension (initially proposed § 5.764(a)(1)(ii)) to improve readability. We note that current § 3.707(a) and (b) refers to "compensation" as one of the benefits to a child or spouse that cannot be paid concurrently with DEA. In the initially proposed rule, we had simply eliminated the reference to "compensation" because a dependent of a veteran has no right to disability

compensation. Further review indicated that in § 3.707(a) and (b) the references to "compensation" are to the additional disability compensation payable to a veteran based on a dependent. Hence, we propose to insert into § 5.764(a)(1)(ii) and (iii), rules governing this issue.

§ 5.765 Payment of Compensation to a Parent Based on the Service or Death of Multiple Veterans

In the initially proposed rule, we reserved § 5.765. However, we inadvertently omitted § 3.700(b)(3) and now propose to add it as § 5.765, "Payment of compensation to a parent based on the service or death of multiple veterans."

Technical Corrections

Other technical corrections will include changes based on typographical errors or changes in wording that are necessary to maintain consistency throughout part 5. For example, we mean to add either "disability" or "death" in front of the term "compensation", where doing so would specify the type of compensation at issue. We also propose to replace the term "helpless", as it relates to a child, with the more descriptive term, "became permanently incapable of self-support before reaching age 18" for purposes of conformity with § 5.227. Section 5.227 pertains to the considerations that VA will use in determining whether a person can be recognized as a "child" for benefit purposes. As another example, we propose to substitute the word "if" for "when" where appropriate and vice versa. We use the word "when" to describe instances where an event is certain to occur, such as the eventual death of a veteran.

We use the word “if” to describe instances where an event is not certain to occur, such as the marriage or divorce of a veteran.

XVIII. Subpart M: General Provisions AL74 Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

In a document published in the Federal Register on January 14, 2011, we proposed to rewrite VA regulations governing apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries, to be published in new 38 CFR part 5. 76 FR 2766. We provided a 60-day comment period that ended on March 15, 2011. We received submissions from four commenters, the National Organization of Veterans’ Advocates, Inc.; Swords to Plowshares; and two private individuals.

§ 5.770 Apportionment claims.

The preamble to initially proposed § 5.770 discussed the omission of death compensation provisions from part 5. The preamble said that 3.450(d) refers to § 3.459, a death compensation provisions to which part 5 would have no counterpart. We failed to state that § 5.770(d) would restate the § 3.450(d) rule of apportionment among children, for DIC benefits.

§ 5.790 Determinations of Incompetency and Competency.

Two of the commenters addressed initially proposed §§ 5.790(c) and (d). In the AL74 preamble to initially proposed § 5.790, “Determinations of incompetency and competency”, we stated:

> Proposed § 5.790 is based on current §§ 3.353 and 3.400(x) and (y). Proposed § 5.790(c) is based on current 38 CFR 3.353(c) which begins, ''Unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the [agency of original jurisdiction] will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.'' The phrase ''clear, convincing and leaves no doubt'' is inconsistent with traditional legal evidentiary standards. Traditionally, ''clear and convincing'' is a distinct standard. ''Leaves no doubt'', however, suggests a significantly higher standard. Further, if compared to the standard for conviction in a criminal case (''beyond a reasonable doubt''), ''leaves no doubt'' could be considered an even higher standard that is inconsistent with other areas of the law. Therefore, we are removing the term ''leaves no doubt'' and instead simply specifying a ''clear and convincing'' standard. ''Clear and convincing'' is a high evidentiary standard that will permit VA to make a determination of incompetency without requesting an essentially unnecessary medical opinion. Further, the standard is sufficiently high to prevent unwarranted determinations of incompetency. See Thomas v. Nicholson, 423 F.3d 1279, 1283 (Fed. Cir. 2005) (''The 'clear and convincing' standard is 'reserved to protect particularly important interests in a limited number of civil cases' where there is a clear liberty interest at stake, such as commitment for mental illness, deportation, or denaturalization.'') (citations omitted).

Initially proposed § 5.790(d) was an exact restatement of current 38 CFR 3.353(d), except that we had proposed to update the citation from the part 3 citation, § 3.102, to the part 5 equivalent, § 5.3(b)(2) (now § 5.3(b)(3)).

Regarding initially proposed § 5.790(c), the first commenter asserted that VA should never make a determination of incompetency without medical evidence that the claimant is mentally incompetent to manage his or her affairs. The commenter also urged that VA establish a higher burden of proof for incompetency: "beyond a reasonable doubt." The commenter asserted that this standard is necessary to preserve consistency with the evidentiary standard in initially proposed § 5.790(d), which stated, "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." The commenter also asserted that the higher standard was needed "to protect claimants from incorrect administrative incompetency decisions made by lay VA employees." The commenter asserted that a declaration of incompetency has implications for many activities, including potentially criminalizing firearms ownership.

The second commenter similarly urged VA not to omit "leaves no doubt" from its rewrite of § 3.353(c) and "to maintain 'leaves no doubt' as a standard for showing incompetence." The commenter asserted that omitting "leaves no doubt" from the standards for determining incompetency would prove beneficial only to VA and not to beneficiaries. While acknowledging VA's heavy administrative burden, the commenter asserted that allowing VA to "independently determine" whether an individual is incompetent to receive benefits without requiring a medical examination would be a violation of the individual's constitutional due process rights. Citing Mathews v. Eldridge, 424 U.S. 319 (1976), to support that assertion, the commenter stated that "[i]n Mathews . . . , the Supreme Court acknowledged the legitimacy of a medical examination as an appropriate procedural indicator of eligibility for welfare benefits."

These comments demonstrate an apparent misunderstanding of proposed § 3.353(c) and (d) and initially proposed §§ 5.790(c) and (d). Both commenters appear to mistakenly think that "clear, convincing and leaves no doubt" is the general evidentiary standard for showing incompetency under current § 3.353. It is not. It is an

evidentiary standard that VA, under current § 3.353(c), requires medical evidence to meet for an agency of original jurisdiction to make an incompetency determination without first obtaining "a definite expression regarding the question by the responsible medical authorities." In accordance with § 3.353(d), the standard of proof to find a beneficiary incompetent when a medical opinion is of record is the preponderance of the evidence. Contrary to the first commenter's assertion, the standard in initially proposed § 5.790(c) is not inconsistent with the standard in initially proposed paragraph (d). Each standard serves a different purpose: the standard in paragraph (c) must be met for VA to make an incompetency determination without a medical opinion on competency; the standard in paragraph (d) applies to weighing all the evidence if a medical opinion is of record.

Similarly, the comments demonstrate an apparent misinterpretation of the language of § 3.353(d) to mean that VA's standard for finding incompetency is "beyond a reasonable doubt", a standard which is used for criminal cases. In fact, the intent of this provision is to state that VA's "reasonable doubt" (or benefit of the doubt) doctrine applies to competency determinations, in the same manner that it applies to VA benefit determinations that are the subject of 38 CFR 3.102. In order to clarify this point, we propose to replace the language of initially proposed § 5.790(d) with language that is substantially the same as proposed § 5.3(b)(3), so that it would read, "When the evidence is in equipoise regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation,

VA will give the benefit of the doubt to the beneficiary and find that he or she is competent."

As to the concerns of both commenters about the standard of proof in proposed § 5.790(c), for the reasons stated in the AL74 NPRM preamble, we decline to include "leaves no doubt" in § 5.790(c) as a standard of proof of incompetency in addition to clear and convincing evidence.

In this regard, the first commenter does not refute any of the statements we made regarding § 5.790(c) in the preamble. We construe the second commenter's statement that "the Supreme Court acknowledged the legitimacy of a medical examination as an appropriate procedural indicator for welfare benefits" as an assertion that VA violates an individual's due process rights if it makes an incompetency determination without requiring a medical examination.

The second commenter's reliance on Mathews v. Eldridge is misplaced. The issue in Mathews was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." 424 U.S. at 323. The Court compared termination of welfare payments with the termination of Social Security disability insurance (SSDI) payments. The court held that "an evidentiary hearing is not required prior to the termination of [Social Security] disability benefits and that the present administrative procedures fully comport with due process." 424 U.S. at 349.

Though a VA incompetency determination is not a termination (or even a reduction) of benefits, initially proposed § 5.790(e) affords an evidentiary hearing prior to making the determination. We cannot agree that initially proposed § 5.790 violates any person's right to due process; it would afford beneficiaries the very process that the Court determined to be necessary only when the beneficiary of a government benefit program is most burdened by termination of the benefit. 424 U.S. at 339-43.

The commenter apparently construes the Court's mention of physical examinations in Mathews to mean that due process requires VA to examine a person as part of the process in an incompetency determination. We disagree. The Court mentioned medical examinations in the context of discussing SSA's process in determining continuing entitlement to SSDI. 424 U.S. at 337 ("If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician"). Nothing in that process requires the agency to examine the beneficiary. Likewise, VA is not required to examine a beneficiary under § 5.790; however, nothing in initially proposed § 5.790 precludes VA from arranging for a beneficiary's examination if necessary to determine competency.

To the extent that the second commenter means that VA should simply obtain an examination in every incompetency determination, and that failure to do so violates

constitutional due process, the commenter essentially argues for part 5 to create a new requirement for incompetency determinations. The purpose of the Regulation Rewrite program is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

For the sake of complete discussion of the comment, we also interpret it to mean that VA violates a beneficiary's right to due process to allow an AOJ to make an incompetency determination based on merely "clear and convincing evidence" without first obtaining a medical opinion. The commenter would have us include "leaves no doubt", asserting that due process requires that the AOJ obtain a medical opinion unless the evidence "leaves no doubt" about incompetency. We disagree.

Even if the evidentiary standard for when an AOJ must obtain a medical opinion prior to making an incompetency determination were a matter of due process, the "clear and convincing evidence" standard is sufficient. "Leaves no doubt" would be an excessively high evidentiary standard. See Mathews, 424 U.S. at 335 (Factors to determine the requirements of due process in various proceedings).

As we explained in the prior NPRM, 76 FR 2777, "clear and convincing" and "leaves no doubt" are inconsistent evidentiary standards, the latter amounting to a standard higher even than that required for criminal conviction, that is, beyond a reasonable doubt. "Leaves no doubt" is a higher evidentiary standard than in any other

regulation governing VA compensation or pension benefits. The Supreme Court has held that a "clear and convincing" standard of proof meets the due process requirements for such significant deprivation of liberty as involuntary indefinite commitment to a state mental hospital, and that the "beyond a reasonable doubt" standard is not required. Addington v. Texas, 441 U.S. 418 (1979). In contrast, liberty is not at stake in VA incompetency determinations.

The result of a VA determination of incompetency is appointment of a fiduciary to receive VA funds for the beneficiary. Clear and convincing medical evidence as to a person's incompetency is sufficient for the specific purpose of authorizing the AOJ to make an incompetency determination without first obtaining an additional medical opinion. The clear and convincing standard provides a beneficiary adequate protection against an erroneous finding of incompetency resulting from a determination made without obtaining "a definite expression as to the question by the responsible medical authorities." We propose to make no change in response to an assertion that due process requires that the AOJ obtain a medical opinion before determining incompetency unless medical the evidence "leaves no doubt" of incompetency.

The second commenter asserted that omitting "leaves no doubt" would benefit only VA and not beneficiaries. We think the omission benefits both VA and its beneficiaries. Including "leaves no doubt" would cause needless delay in making incompetency determinations that conserve the benefits of those who cannot manage them. That delay is a detriment to beneficiaries. Eliminating that delay would be a

benefit to persons who need the protection of a fiduciary to manage their funds. Including "leaves no doubt" in § 5.790(c) would increase administrative costs and consume scarce VA human resources to obtain medical opinions that are unlikely to bring helpful new information to the determination, and the risk of erroneous determinations without those opinions is slight. Consequently, we propose to make no change based on this comment.

Finally, we agree with the first commenter that VA should always have medical evidence in order to determine competency. Nothing in initially proposed § 5.790 contradicts that premise. Indeed, proposed § 5.790(c) and (d) both make clear that medical evidence is required to find a beneficiary incompetent. Under these provisions, either clear and convincing "medical evidence" of incompetency is already of record or a medical opinion addressing competency is obtained. Accordingly, we need make no change to address this concern of the commenter. Further, regarding the first commenter's sweeping comment about the need to protect beneficiaries from incorrect competency decisions by lay VA employees, we note that there is an administrative remedy if a beneficiary believes he or she has been wrongly declared incompetent: appeal to the Board of Veterans' Appeals and, if he or she disagree with that decision, to the U.S. Court of Appeals for Veterans Claims. Accordingly, we make no change based on this concern of the commenter.

§ 5.810 Incarcerated Beneficiaries – General Provisions and Definitions.

One commenter on initially proposed § 5.810 urged VA to include felony convictions from foreign countries in the definitions governing incarcerations in § 5.810(b) only if the courts of the foreign country are subject to a standard Status of Forces Agreement or have due process and procedural rights equivalent to those which apply in courts in the U.S. As discussed in the AL74 preamble, initially proposed § 5.810 incorporates significant protections with regard to foreign convictions: it excludes incarceration in a foreign prison and includes incarceration in a U.S. prison based on a foreign conviction only if the offense is equivalent to a felony (or a misdemeanor for purposes of 38 U.S.C. 1505) under the laws of the U.S. Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

Initially proposed § 5.810(c) stated, "The 60-day periods of incarceration described in §§ 5.811 through 5.813 begin on the day after the beneficiary is convicted of a felony (or misdemeanor for pension), if the beneficiary is incarcerated as of that date, even if the beneficiary is not sentenced on that date." One commenter urged that the incarceration period in paragraph (c) not begin on the date of conviction "in recognition of the realities of sentencing." The commenter added "[a]t the sentencing hearing, the trial judge might impose an alternate sentence involving no incarceration, such as home confinement or probation."

As we stated in the preamble to AL74, “This [paragraph (c)] accords with 38 U.S.C. 1505 and 5313, which are concerned with the time spent imprisoned for a felony, or for a misdemeanor in pension cases, and not with the amount of time that the beneficiary is sentenced to serve. It also accords with VAOPGCPREC 3–2005, 72 FR 5801, 5802 (Feb. 7, 2007).” The fact that the sentence ultimately imposed by the court might not include incarceration does not alter VA’s duty to limit payments when a beneficiary has been incarcerated for more than 60 days after being convicted. We therefore propose to make no change based on this comment.

One commenter objected to the rule set forth in initially proposed § 5.810(d), requiring that claimants or beneficiaries inform VA if they are incarcerated. The commenter asserted that the rule puts an undue burden on incarcerated veterans because they are “often impoverished or unfamiliar with system procedures” and that VA’s promulgation of this rule fails to “take full account of the social, educational, and societal contexts that many incarcerated veterans come from.” The commenter also asserted that “VA should be able to gather that information from the Bureau of Prisons or the state.”

As stated in the preamble to initially proposed § 5.810, we believe the rule established in paragraph (d) is logical, fair, and consistent with other current provisions that require claimants or beneficiaries to inform VA of changes in circumstances affecting entitlement to benefits. See § 3.652, ‘‘Periodic certification of continued eligibility’’, and § 3.660(a)(1), ‘‘Dependency, income and estate’’. In addition, enabling

VA to adjust benefits promptly on the 61st day of incarceration would be advantageous to both veterans and VA because if benefits are not promptly adjusted, VA must establish an overpayment and recoup the debt from the veteran. We do not believe that the social or educational background of incarcerated veterans prevents them from notifying VA of changes in circumstances. Veterans may notify VA via mail, email through www.va.gov, or by calling our toll free number, 1-800-827-1000.

Regarding the suggestion that "VA should be able to gather that information from the Bureau of Prisons or the state," we note that VA already has data sharing agreements with the Federal Bureau of Prisons (BOP) and the Social Security Administration (SSA). Under our agreement with BOP, that agency periodically provides VA with a master record of all federal prisoners. Under our agreement with SSA, that agency provides VA with a master record of all prisoners who are incarcerated in state or local facilities. Although these records are intended to be comprehensive, errors or delays may prevent VA from learning of a veteran's incarceration in a timely manner. Requiring veterans to inform VA adds an additional means for VA to obtain this information, thus reducing the frequency and amount of erroneous payments. We therefore make no change based on this comment.

§ 5.811 Limitation on Disability Compensation During Incarceration.

Initially proposed § 5.811 implemented the statutory requirement from 38 U.S.C. 5313 that VA limit the amount of disability compensation paid to a veteran who has been incarcerated for more than 60 days after conviction of a felony if the veteran

committed the felony after October 7, 1980. One commenter noted that VA's Adjudication Manual, M21-1MR, requires VA employees to limit payments when notified by one of our federal data sharing agreements that a veteran is incarcerated. The commenter, a non-profit organization that represents veterans in their VA claims, stated that in their experience, when VA receives such notice, it presumes that the veteran has been convicted of a felony rather than a misdemeanor and remains incarcerated 60 days later. The commenter urged VA to add a provision to § 5.811(a) stating that VA will not limit benefits "until it receives official verification that the veteran has been incarcerated for more than 60 days after a conviction of a felony."

As a preliminary matter, we note that VA does not limit benefits based on incarceration without providing due process under 38 CFR 3.103. Under that provision, VA notifies the veteran that it proposes to limit benefits based on information indicating that he or she is incarcerated. Before VA will take action to limit benefits, the veteran has 60 days in which to respond (e.g., provide evidence to VA showing that he or she was incarcerated for less than 61 days or incarcerated for conviction of a misdemeanor, not a felony).

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment recommending additional, new procedures is outside the scope of this rulemaking.

§ 5.812 Limitation on Dependency and Indemnity Compensation During Incarceration.

Initially proposed § 5.812(d) stated, "Whenever DIC is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section shall be paid to the incarcerated person." This language is restated for compensation (§ 5.811(b)). It is nearly identical to the wording found in current 38 CFR 3.665(k).

One commenter urged, "In order to clarify that there will be no reduction for amounts due prior to the date of reduction, the language in subsection (d) should read as follows: 'Any amounts due for periods prior to the date of limitation under this section shall be paid to the incarcerated person without the limitation imposed under this section.'"

We believe the language of §§ 3.665(k), 5.811(b), and 5.812(d) are entirely clear that "amounts due for periods prior to the date of reduction under this section" means the normal amount payable to an unincarcerated beneficiary. We therefore propose to make no change based on this comment.

§ 5.813 Discontinuance of Pension During Incarceration.

Initially proposed § 5.813(b)(2) stated, in part:

> If the veteran has a spouse or child but elects to receive disability compensation after VA has notified the veteran of the effect of electing disability compensation on the amount available for apportionment, then the award of disability compensation will be effective on the later of the date VA received the

veteran's election or the date of discontinuance of pension under paragraph (a) of this section.

Regarding this proposed language, one commenter stated, "The applicability of the 'mailbox rule' is not readily apparent in the proposed language" and suggested that the following language be added: "If the veteran's election is submitted by U.S. Mail, the date received will be considered to be the postmark date." The commenter offered no reason why this rule should be incorporated into paragraph (b)(2).

We did not imply nor intend that the "mailbox rule" apply in § 5.813. Current VA regulations in 38 CFR part 3 do not contain such a rule. The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.814 Apportionment When a Primary Beneficiary Is Incarcerated.

One commenter approved of the regulations in AL74 limiting payments to incarcerated veterans and urged that VA stop apportioning such payments to the families of incarcerated veterans. The commenter did not explain the basis for the comment that benefits should not be apportioned to the incarcerated beneficiary's family.

Congress specifically authorized VA to make apportionments of compensation and dependency and indemnity compensation to dependents of incarcerated beneficiaries in 38 U.S.C. 1505(b) and (c) and 5313(b), and such apportionments may

be important in avoiding hardship to the beneficiary's dependents during the beneficiary's incarceration. Further, the purpose of the reduction of benefits is not to further punish the incarcerated beneficiary, but to prevent unnecessary expenditure of government funds to persons otherwise supported at government expense and to avoid accumulation of funds with prisoners who might use those funds to purchase contraband. Prohibiting apportionment to an incarcerated beneficiary's dependents would not further those objectives.

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.815 Resumption of Disability Compensation or Dependency and Indemnity Compensation upon a Beneficiary's Release from Incarceration.

§ 5.816 Resumption of Pension upon a Beneficiary's Release from Incarceration.

One commenter urged VA to remove the requirement in initially proposed §§ 5.815-5.816 that the veteran inform VA when he or she is released from incarceration, in order for VA to restore benefits by a certain date. The commenter noted that there is a link between military service during wartime and subsequent incarceration and asked that VA thank veterans for their service by not requiring them "to re-legitimize their standing as war veterans."

We note that these provisions are not new; they have existed in 38 CFR 3.665(i) and 3.666(c) for decades. We do not believe it is unduly burdensome for veterans to inform VA when they are released from incarceration; as stated above regarding proposed § 5.810, this can be easily done through a variety of methods—via mail, email through www.va.gov, or by calling our toll free number, 1-800-827-1000. Moreover, VA's data sharing agreements with BOP and SSA (also discussed above regarding § 5.810) do not provide VA with notice when a veteran is released from incarceration. For these reasons, we propose to make no change based on this comment.

§ 5.817 Fugitive Felons.

Consistent with 38 U.S.C. 5313B and current 38 CFR 3.665-3.666, initially proposed § 5.817 stated that VA will not pay or apportion benefits to, for, or on behalf of a person for any period during which that person is a fugitive felon. Also consistent with those provisions, initially proposed § 5.817 defined fugitive felon as a person who is "(i) Fleeing to avoid prosecution for a felony or for an attempt to commit a felony; (ii) Fleeing custody or confinement after conviction of a felony or conviction of an attempt to commit a felony; or (iii) Fleeing to avoid custody or confinement for violating a condition of probation or parole imposed for commission of a felony under Federal or State law."

One commenter noted that, although the proposed language mirrors the statutory language, VA's Adjudication Manual, M21-1MR, states that a person is presumed to be a fugitive felon if there is an outstanding arrest warrant against them. This is problematic, the commenter asserted, because "the warrant may be many years old

and it is possible the veteran has no idea that a warrant was even issued, let alone outstanding." The commenter noted that the Social Security Administration (SSA) has a similar statutory requirement and previously operated under such a presumption. The commenter noted that "multiple lawsuits forced SSA to alter enforcement of [its] regulation and pay back millions of dollars in benefits to affected individuals." The commenter urged VA to revise § 5.817 to define a fugitive felon as "one who has a specific intent to flee or avoid prosecution for a felony, specific intent to flee or avoid custody after conviction of a felony, or specific intent to flee or avoid a condition of felony probation or parole."

As with limitations of benefits for incarcerated benefits under § 5.811, VA provides the same type of due process for veterans who may be fleeing felons. These due process procedures would mitigate the situations that the commenter is concerned with. That is, the veteran has the opportunity to present evidence showing that he or she was not actually fleeing, and if that is shown, then VA will take no action to limit benefits.

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment 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. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing

costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires review by the Office of Management and Budget (OMB), as "any regulatory action that is likely to result in a rule that may: 1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; 2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; 3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or 4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order." The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

VA has determined that there are no direct costs or savings associated with this proposed rulemaking, because it will neither expand nor restrict the rights or benefits of VA claimants or beneficiaries and will not change the way VA develops, processes, or pays a claim for benefits. VA has not yet determined the exact manner in which it will transition from the current part 3 regulations to the part 5 regulations. Prior to publication of the final rule, VA will determine this and estimate the costs associated with this transition.

Executive Order 13563 also requires federal agencies to make regulations "accessible, consistent, written in plain language, and easy to understand" and requires "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them. . ." This NPRM is the cornerstone of VA's compliance with this Executive Order. See www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-

Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on January 30, 2013, for publication.

List of Subjects in 38 CFR Parts 3 and 5

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

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William F. Russo
Deputy Director
Office of Office of Regulations Policy and Management
Office of the General Counsel
Department of Veterans Affairs

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 3 and further amend 38 CFR part 5, as proposed to be added at 69 FR 4820, Jan. 30, 2004, and as further proposed to be amended at 69 FR 44614, July 27, 2004; 69 FR 59072, Oct. 1, 2004; 73 FR 19021, Apr. 8, 2008; 71 FR 37790, June 30, 2006; 70 FR 24680, May 10, 2005; 69 FR 77578, Dec. 27, 2004, 72 FR 10860, Mar. 9, 2007; 71 FR 16464, Mar. 31, 2006; 70 FR 61326, Oct. 21, 2005; 71 FR 55052, Sept. 20, 2006; 72 FR 56136, Oct. 2, 2007; 72 FR 28770, May 22, 2007; 72 FR 54776, Sept. 26, 2007; 71 FR 31056, May 31, 2006; and 73 FR 20136, Apr. 14, 2008, as follows:

PART 3—ADJUDICATION

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

1. The authority citation for 38 CFR part 3, subpart A, continues to read as follows:

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

2. Add § 3.0 to read as follows:

§ 3.0 Scope and applicability.

This part applies only to claims for benefits filed before [EFFECTIVE DATE OF FINAL RULE]. See § 5.0 of this chapter, Scope and applicability.

* * * * *

3. Add part 5 to read as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart A: General Provisions

5.0 Scope and applicability.

5.1 General definitions.

5.2 Terms and usage.

5.3 Standards of proof.

5.4 Claims adjudication policies.

5.5 Delegations of authority.

5.6–5.19 [Reserved]

Subpart B: Service Requirements for Veterans

PERIODS OF WAR AND TYPES OF MILITARY SERVICE

5.20 Dates of periods of war.

5.21 Service VA recognizes as active military service.

5.22 Service VA recognizes as active duty.

5.23 How VA classifies Reserve and National Guard duty.

5.24 How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.

5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.

5.26 Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.

5.27 Individuals and Groups that Qualify as Having Performed Active Military Service for purposes of VA Benefits Based on Designation by the Secretary of Defense.

5.28 Other groups designated as having performed active military service.

5.29 Circumstances under which certain travel periods may be classified as military service.

5.30 How VA determines if service qualifies for benefits.

BARS TO BENEFITS

5.31 Statutory bars to benefits.

5.32 Consideration of compelling circumstances when veteran was separated for AWOL.

5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for benefits.

MILITARY DISCHARGES AND RELATED MATTERS

5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.

5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.

5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.

5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.

5.38 Effect of a voided enlistment on eligibility for VA benefits.

MINIMUM SERVICE AND EVIDENCE OF SERVICE

5.39 Minimum active duty service requirement for VA benefits.

5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.

5.41–5.49 [Reserved]

Subpart C – Adjudicative Process, General.

VA BENEFIT CLAIMS

5.50 Applications VA Furnishes.

5.51 Filing a claim for disability benefits.

5.52 Filing a claim for death benefits.

5.53 Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.

5.54 Informal claims.

5.55 Claims based on new and material evidence.

5.56 Report of examination, treatment, or hospitalization as a claim.

RIGHTS OF CLAIMANTS AND BENEFICIARIES

DUTIES OF VA

RESPONSIBILITIES OF CLAIMANTS AND BENEFICIARIES

GENERAL RULES ON REVISION OF DECISIONS

GENERAL RULES ON PROTECTION OR REDUCTION OF EXISTING RATINGS

Subpart D: Dependents and Survivors

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MARRIAGE, DIVORCE, AND ANNULMENT

5.192 Evidence of marriage.

5.193 Proof of marriage termination where evidence is in conflict or termination is contested.

5.194 Acceptance of divorce decrees.

5.195 [Reserved]

5.196 Void or annulled marriages.

5.197 Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.

5.198–5.199 [Reserved]

SURVIVING SPOUSE STATUS

5.200 Surviving spouse: requirement of valid marriage to veteran.

5.201 Surviving spouse: requirements for relationship with the veteran.

5.202 [Reserved]

5.203 Effect of remarriage on a surviving spouse's benefits.

5.204 [Reserved]

5.205 Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.

5.206–5.219 [Reserved]

CHILD STATUS

5.220 Status as a child for VA benefit purposes.

5.221 Evidence to establish a parent/natural child relationship.

5.222 Evidence to establish an adopted child relationship.

5.223 Child adopted after a veteran's death.

5.224 Child status despite adoption out of the veteran's family.

5.225 Child status based on adoption into a veteran's family under foreign law.

5.226 Child status based on being a veteran's stepchild.

5.227 Child status based on permanent incapacity for self-support.

5.228 Exceptions applicable to termination of child status based on marriage of the child.

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5.230 Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.

5.231 Effective date of reduction or discontinuance: child reaches age 18 or 23.

5.232 Effective date of reduction or discontinuance: terminated adoptions.

5.233 Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household.

5.234 Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.

5.235 Effective date of an award of benefits due to termination of a child's marriage.

5.236–5.237 [Reserved]

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5.238 Status as a veteran's parent.

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Subpart E: Claims for Service Connection and Disability Compensation

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5.240 Disability compensation.

5.241 Service-connected disability.

5.242 General principles of service connection.

5.243 Establishing service connection.

5.244 Presumption of sound condition on entry into military service.

5.245 Service connection based on aggravation of preservice injury or disease.

5.246 Secondary service connection—disability that is due to or the result of service-connected disability.

5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.

5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.

5.249 Special service connection rules for combat-related injury or disease.

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5.334 Special monthly compensation tables.

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5.336 Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.

5.337–5.339 [Reserved]

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5.340 Pulmonary tuberculosis shown by X-ray in active military service.

5.341 Presumption of service connection for tuberculous disease; wartime and service after December 31, 1946.

5.342 Initial grant following inactivity of tuberculosis.

5.343 Effect of diagnosis of active tuberculosis.

5.344 Determination of inactivity (complete arrest) of tuberculosis.

5.345 Changes from activity in pulmonary tuberculosis pension cases.

5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.

5.347 Discontinuance of a total disability rating for service-connected tuberculosis.

5.348–5.349 [Reserved]

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

5.351 Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

5.352 Effect of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962, on benefits awarded under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

5.353 Effect of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962, on benefits awarded under 38 U.S.C. 1151(a).

5.354–5.359 [Reserved]

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5.360 Service connection of dental conditions for treatment purposes.

5.361 Health-care eligibility of a person administratively discharged under other-than-honorable conditions.

5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.

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DEPENDENCY AND INDEMNITY COMPENSATION – ELIGIBILITY REQUIREMENTS AND PAYMENT RULES FOR A PARENT

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5.545 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.

5.546–5.550 [Reserved]

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5.552 Claims for accrued benefits.

5.553 Notice of incomplete applications for accrued benefits.

5.554 benefits payable as accrued benefits.

5.555 Relationship between accrued-benefits claims and claims filed by the deceased beneficiary.

5.556–5.563 [Reserved]

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5.564 Cancellation of checks mailed to a deceased payee; payment of such funds as accrued benefits.

5.565 Special rules for payment of benefits on deposit in a special deposit account when a payee living in a foreign country dies.

5.566 Special rules for payment of all benefits except insurance payments deposited in a personal-funds-of-patients account when an incompetent veteran dies.

5.567 Special rules for payment of Old-Law Pension when a hospitalized competent veteran dies.

5.568 Non-payment of certain benefits upon death of an incompetent veteran.

5.569–5.579 [Reserved]

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5.581 Awards of benefits based on special acts or private laws.

5.582 Naval pension.

5.583 Special allowance under 38 U.S.C. 1312.

5.584 Loan guaranty for a surviving spouse: eligibility requirements.

5.585 Certification for death gratuity.

5.586 Certification for dependents' educational assistance.

5.587 Minimum income annuity and gratuitous annuity.

5.588 Special allowance payable under section 156 of Public Law 97-377.

5.589 Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.

5.590 Monetary allowance for a female Vietnam veteran's child with certain birth defects.

5.591 Effective date of award for a disabled child of a Vietnam veteran or a veteran with covered service in Korea.

5.592 Awards under Nehmer Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.

5.593–5.599 [Reserved]

ANCILLARY BENEFITS FOR CERTAIN SERVICE-CONNECTED VETERANS AND CERTAIN MEMBERS OF THE ARMED FORCES SERVING ON ACTIVE DUTY

5.600–5.602 [Reserved]

5.603 Financial assistance to purchase a vehicle or adaptive equipment.

5.604 Specially adapted housing under 38 U.S.C. 2101(a).

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5.606 Clothing allowance.

5.607–5.609 [Reserved]

Subpart I: Benefits for Certain Filipino Veterans and Survivors

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5.610 Eligibility for benefits based on Philippine service.

5.611 Philippine service: determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.

BENEFITS AND EFFECTIVE DATES OF CERTAIN FILIPINO VETERANS AND SURVIVORS

5.612 Overview of benefits available to a Filipino veteran and his or her survivor.

5.613 Payment of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S.

5.614 Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor.

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5.706 Payments excluded in calculating income or net worth.

5.707 Deductible medical expenses.

5.708 Eligibility verification reports.

5.709 Claimant and beneficiary responsibility to report changes.

5.710 Adjustment in benefits due to reduction or discontinuance of a benefit to another payee.

5.711 Payment to dependents due to the disappearance of a veteran for 90 days or more.

5.712 Suspension of benefits due to the disappearance of a payee.

5.713 Restriction on benefit payments to an alien located in enemy territory.

5.714 Restriction on delivery of benefit payments to payees located in countries on Treasury Department list.

5.715 Claims for undelivered or discontinued benefits.

5.716–5.719 [Reserved]

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

5.722 Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care.

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5.724 Adjustment or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

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5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care.

5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

5.731–5.739 [Reserved]

PAYMENTS TO A BENEFICIARY WHO IS ELIGIBLE FOR MORE THAN ONE BENEFIT: GENERAL PROVISIONS

5.740 Definitions relating to elections of benefits.

5.741 Persons who may make an election of benefits.

5.742 Finality of elections; cancellation of certain elections of benefits.

5.743 General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.

5.744 [Reserved]

PAYMENTS FROM SERVICE DEPARTMENTS AND THE EFFECTS OF THOSE PAYMENTS ON VA BENEFITS

5.745 Entitlement to concurrent receipt of military retired pay and VA disability compensation.

5.746 Prohibition against receipt of active military service pay and VA benefits for the same period.

PAYMENTS FROM OTHER FEDERAL AGENCIES AND THE EFFECTS OF THOSE PAYMENTS ON VA BENEFITS FOR A VETERAN AND SURVIVOR

RULES CONCERNING THE RECEIPT OF MULTIPLE VA BENEFITS

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5.816 Resumption of pension upon a beneficiary's release from incarceration.

5.817 Fugitive felons.

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart A—General Provisions

§ 5.0 Scope and applicability.

(a) Scope. Except as otherwise provided, this part applies only to benefits governed by this part.

(b) Applicability. This part will apply prospectively, not retroactively.

(1) This part will apply to all claims for benefits VA receives on or after [INSERT THE EFFECTIVE DATE OF THE FINAL RULE].

(2) This part will apply to new actions VA or a claimant or beneficiary initiated on or after [EFFECTIVE DATE OF THE FINAL RULE] that pertain to either a running award of benefits or, subject to § 5.162, to a prior final decision. Such new actions include, but are not limited to, actions involving reduction or discontinuance of benefits, pension maintenance, adjustment of awards based on dependents, and apportionments.

(3) Part 3 of this chapter will continue to apply to all claims VA received before [EFFECTIVE DATE OF THE FINAL RULE] and all actions VA or a claimant or beneficiary initiated before that date that were not finally decided by that date.

(4) Part 3 of this chapter will continue to apply to death compensation and Spanish-American War benefits.

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

§ 5.1 General definitions.

The following definitions apply to this part:

Accrued benefits means unpaid periodic monetary benefits to which a person was entitled, based on the evidence in the file on the date of his or her death, from a claim for benefits pending on the date of death.

CROSS REFERENCE: § 5.554(a) (identifying benefits that VA may pay as accrued benefits).

Active military service means active military, naval, or air service, as defined in 38 U.S.C. 101(24) and as described in § 5.21.

Agency of original jurisdiction means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.

Alien means any person not a citizen or national of the U.S.

Application means a specific form the Secretary requires a claimant to file to apply for a benefit.

Armed Forces means the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard, including their reserve components.

(Authority: 38 U.S.C. 101(10))

Beneficiary means a person in receipt of benefits under this part. Under certain circumstances, a beneficiary may also meet the definition of a claimant (for example, when seeking an increased compensation rating or contesting a proposed reduction in benefits).

Benefit means any VA payment, service, commodity, function, or status, entitlement to which is determined under this part, except as otherwise provided.

Certified statement means a statement made and signed by a person who affirms that the statement is true and accurate to the best of that person's knowledge and belief.

Child born of the marriage and child born before the marriage. A child born of the marriage means a child of a deceased veteran born on or after the date of a marriage that is the basis of a surviving spouse's entitlement to benefits. A child born before the marriage means a child of a deceased veteran born before the date of a marriage that is the basis of a surviving spouse's entitlement to benefits. Neither of these terms includes an adopted child or a stepchild.

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

Claim means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit under this part.

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

Claim for benefits pending on the date of death means a claim filed with VA which had not been finally adjudicated by VA on or before the date of death. Such a claim may include a deceased claimant's claim to reopen a finally denied claim based upon new and material evidence or a deceased claimant's claim of clear and unmistakable error in a prior rating or decision. Any new and material evidence submitted to reopen the claim must have been in VA's possession on or before the date of the beneficiary's death.

Claimant means a person applying for, or filing a claim for, any benefit under this part.

(Authority: 38 U.S.C. 5100)

Competent evidence means competent expert evidence or competent lay evidence.

(1) Competent expert evidence. Expert evidence is a statement or opinion based all or in part on scientific, medical, technical, or other specialized knowledge. Examples include, but are not limited to, medical or scientific opinions. Expert evidence is competent if the person upon whose knowledge the evidence is based is qualified through education, training, or experience to offer the statement or opinion comprising the evidence.

(2) Competent lay evidence. Lay evidence is a statement or opinion offered by a lay person. A lay person is a person without relevant specialized education, training, or

experience. Lay evidence is competent if it is provided by a person who has personal knowledge of facts or circumstances described in the statement or opinion comprising the evidence and if those facts or circumstances can be observed and described by a lay person.

NOTE TO THE DEFINITION OF COMPETENT EVIDENCE: In VA's nonadversarial system, all evidence is admitted into the record. VA does not exclude from the record evidence that is not "competent" under this section; however, such evidence may not be probative because it is not competent.

Custody of a child means that a person or institution is legally responsible for the welfare of a child and has the legal right to exercise parental control over the child. Such a person or institution is the "custodian" of the child.

Direct service connection means that the evidence proves that the veteran's injury or disease resulting in disability or death was incurred or aggravated in the line of duty during active military service without application of the presumptions of service connection in subpart E of this part; or of secondary service connection under § 5.246, or § 5.247.

Discharged or released from active military service includes, but is not limited to, either of the following events:

(1) Retirement from the active military service; or

(2) Completion of active military service for the period of time a person was obligated to serve at the time of entry into that period of service in cases where both of the following elements are true:

(i) The person was not discharged or released at the end of that period of time due to an intervening change in military status, as defined in § 5.37; and

(ii) The person would have been eligible for a discharge or release under conditions other than dishonorable at the end of that period of time except for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

Drugs means chemical substances that affect the processes of the mind or body and that may cause intoxication or harmful effects if abused. This includes prescription and non-prescription drugs, whether obtained legally or illegally.

Effective the date of the last payment means that VA's action is effective as of the first day of a month in which it is possible to suspend, reduce, or discontinue a benefit payment without creating an overpayment.

Evidence in the file on the date of death means evidence in VA's possession on or before the date of the deceased beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death.

(Authority: 38 U.S.C. 501(a), 5121(a); Sec. 104, Pub. L. 108-183, 117 Stat. 2656)

Final decision means a decision on a claim for benefits of which VA sent the claimant written notice as required by § 5.83, and:

(1) The claimant did not file a timely Notice of Disagreement in compliance with § 20.302(a) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(a) of this chapter;

(2) The claimant filed a timely Notice of Disagreement, but did not file a timely Substantive Appeal in compliance with § 20.302(b) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(b) of this chapter; or

(3) In the case of a decision by the Board of Veterans' Appeals, the decision is final under § 20.1100 of this chapter.

(Authority: 38 U.S.C. 7105)

Fraud means any of the following, as applicable:

(1) As used in § 5.676, fraud means 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 benefit except insurance payments.

(2) As used in §§ 5.196 and 5.203, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for purpose of obtaining, or

assisting a person 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.

(3) As used in §§ 5.172, 5.174, and 5.175, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for purpose of obtaining or retaining, or assisting a person to obtain or retain, eligibility for 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. 103, 110, 1159, 6103(a))

Insanity, as a defense to commission of an act, means a person had such a defect of reason resulting from injury, disease, or mental deficiency that he or she did not know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity.

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 the line of duty in active military service.

Notice means either:

(1) A written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any; or

(2) An oral communication VA conveys to a claimant or beneficiary.

Nursing home means any of the following facilities:

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

(2) A nursing home care unit in a State veterans' home approved for payment under 38 U.S.C. 1742, Inspections of such homes; restrictions on beneficiaries; or

(3) A VA Nursing Home Care Unit.

(Authority: 38 U.S.C. 101(28))

Payee means a person to whom monetary benefits are payable.

Political subdivision of the U.S. means a State, as defined in this section, and the counties (or parishes), cities, or municipalities of a State.

Proximately caused means that the event resulted directly from the cause and would not have occurred without that cause.

Psychosis means any of the following disorders listed in “Diagnostic and Statistical Manual of Mental Disorders”, Fourth Edition, Text Revision, of the American Psychiatric Association (DSM-IV-TR):

(1) Brief Psychotic Disorder;

(2) Delusional Disorder;

(3) Psychotic Disorder Due to General Medical Condition;

(4) Psychotic Disorder Not Otherwise Specified;

(5) Schizoaffective Disorder;

(6) Schizophrenia;

(7) Schizophreniform Disorder;

(8) Shared Psychotic Disorder; and

(9) Substance-Induced Psychotic Disorder.

(Authority: 38 U.S.C. 1101, 1112(a) and (b))

Reserve, or reservist, means a member of a reserve component.

(Authority: 38 U.S.C. 101(26))

Reserve component means the Army, Naval, Marine Corps, Air Force, and Coast Guard Reserves and the Army National Guard and Air National Guard of the U.S.

(Authority: 38 U.S.C. 101(27))

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 Homeland Security, 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; or

(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.

(Authority: 38 U.S.C. 101(25))

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 the line of duty in active military service.

Service treatment records means, regarding an applicant for membership in, or a member of, the Armed Forces, records of medical treatment and examinations

conducted by the Armed Forces or by a civilian health care provider at Armed Forces' expense.

State means each of the several States, Territories, and possessions of the U.S.; the District of Columbia; and the Commonwealth of Puerto Rico. For purposes of 38 U.S.C. 101(20), and 38 U.S.C. chapters 34 and 35, “State” will also include the Canal Zone.

(Authority: 38 U.S.C. 101(20))

Uniformed services means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time federal National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency.

VA means all organizational units of the Department of Veterans Affairs.

Veteran means any of the following persons, as applicable:

(1) A person who had active military service and who was discharged or released under conditions other than dishonorable.

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

(2) A person who died in active military service and whose death was not due to willful misconduct.

(Authority: 38 U.S.C. 1101(1), 1301)

(3) For death pension purposes, a person who died in active military service under conditions that prevent payment of service-connected death benefits. The person must have completed at least 2 years of honorable military service, as certified by the Secretary concerned. See subpart F of this part for eligibility information.

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

Willful misconduct, for purposes of this part, means an act involving deliberate or intentional wrongdoing with knowledge, or wanton and reckless disregard, of its probable consequences. Civil infractions (such as mere technical violation of police regulations or other ordinances) will not, by themselves, constitute willful misconduct.

§ 5.2 Terms and usage.

Unless otherwise provided, a singular noun in this part that refers to a person also includes the plural of that noun (for example, “child” includes “children”). Nouns that follow this rule include, but are not limited to, the following:

(a) Veteran;

(b) Claimant;

(c) Beneficiary;

(d) Dependent;

(e) Spouse;

(f) Child;

(g) Parent; and

(h) Survivor.

§ 5.3 Standards of proof.

(a) Applicability. This section states the general standards of proof to prove a fact or resolve an issue material to deciding a claim and to rebut presumptions. These standards apply unless a statute or another section of this part specifically provides otherwise.

(b) Proving a fact or issue—(1) Weight of the evidence. Weight of the evidence means the persuasiveness of some evidence in comparison with other evidence.

(2) Equipoise. Equipoise means that there is an approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact or the resolution of a particular issue.

(3) Benefit of the doubt rule. When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor. A fact or issue that would tend to disprove a claim must be established by a preponderance of the evidence. The benefit

of the doubt rule applies even in the absence of official records. For example, in applying the standard, VA will consider that no official records may have been kept in cases where an alleged incident arose under combat or similarly strenuous conditions if the incident is consistent with the probable results of such known hardships.

(4) Preponderance of evidence. A fact or issue is established by a "preponderance of evidence" when the weight of the evidence in support of that fact or issue is greater than the weight of the evidence against it.

(5) Weighing the evidence. In determining whether the evidence is in equipoise, VA will consider whether evidence favoring the existence, or nonexistence, of a relevant fact or issue is supported or contradicted by the evidence as a whole and by known facts. Objectively unsupported personal speculation, suspicion, or doubt on the part of a person adjudicating a claim is not a sufficient basis for concluding that the evidence is not in equipoise.

(6) Reopening claims. The standards of proof otherwise provided in this section do not apply when determining if evidence is new and material, but do apply after the claim has been reopened. In determining whether to reopen a claim based on new and material evidence, the evidence need not be in equipoise. VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim. See § 5.55.

(c) Rebuttal of a presumption. A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact. In rebutting a presumption under § 5.260(c), affirmative evidence means evidence supporting the existence of certain facts.

(d) Quality of evidence to be considered. VA does not simply count the pieces of evidence for or against the existence, or nonexistence, of a relevant fact or issue when it is determining whether the applicable standard of proof has been met. VA will assess the credibility and probative value of each piece of evidence and then weigh all the relevant evidence for and against the fact or issue. Not all pieces of evidence will carry equal weight.

(e) Absence of evidence may be evidence. VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue.

(Authority: 38 U.S.C. 501(a), 5107(b))

§ 5.4 Claims adjudication policies.

(a) Ex parte proceedings and assistance. VA conducts its proceedings ex parte, which means that VA is not an adversary of the claimant. VA will assist a claimant or beneficiary in developing his or her claim as provided in § 5.90.

(b) VA decision-making. VA will base its decisions on a review of the entire record, including material pertaining to the claimant or decedent in a death benefit claim. It is VA's defined and consistently applied policy to administer the law under a broad interpretation, consistent with the facts shown in every case. VA will make

decisions that grant every benefit that the law supports while at the same time protecting the interests of the Government.

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

§ 5.5 Delegations of authority.

(a) Entitlement to benefits. Authority to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement to benefits under this part 5 is delegated to the Under Secretary for Benefits, and to supervisory or adjudicative personnel within the Veterans Benefits Administration who are designated by the Under Secretary for Benefits.

(b) Forfeiture. Authority to determine whether a claimant or payee has forfeited the right to benefits or to remit a forfeiture under 38 U.S.C. 6103 or 6104 is delegated to the Director, Compensation Service, the Director, Pension and Fiduciary Service, and to personnel designated by the Directors. See § 5.679.

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

§§ 5.6–5.19 [Reserved]

Subpart B—Service Requirements for Veterans

PERIODS OF WAR AND TYPES OF MILITARY SERVICE

§ 5.20 Dates of periods of war.

This section explains what periods of service VA recognizes as wartime service, beginning with World War I. See 38 U.S.C. 101 for information concerning earlier periods of war. A veteran who served during one of these periods had wartime service.

Period	Dates	Exceptions/Special Rules	Authority
(a) World War I	April 6, 1917, through November 11, 1918.	(1) April 6, 1917, through April 1, 1920, for U.S. Armed Forces serving in Russia. (2) April 6, 1917, through July 1, 1921, for a veteran who served in the active military service after April 5, 1917, and before November 12, 1918. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (disability compensation and death compensation) and benefits under 38 U.S.C. chapter 15 ("Pension for Non-Service-Connected Disability or Death or for Service").	38 U.S.C. 101(7), 1101(2)(A), 1501(2)
(b) World War II	December 7, 1941, through December 31, 1946.	World War II service also includes any period of continuous service after December 31, 1946, and before July 26, 1947, if that period of service began before January 1, 1947. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (disability compensation and death compensation).	38 U.S.C. 101(8), 1101(2)(B)
(c) Korean Conflict	June 27, 1950, through January 31, 1955.	None.	38 U.S.C. 101(9)
(d) Vietnam Era	August 5, 1964, through May 7, 1975.	The Vietnam Era also includes February 28, 1961, through August 4, 1964, in the case of a veteran who served in the Republic of Vietnam during that period.	38 U.S.C. 101(29)
(e) Persian Gulf War	August 2, 1990, through a date		38 U.S.C. 101(33)

Period	Dates	Exceptions/Special Rules	Authority
	to be prescribed by Presidential proclamation or by law.		
(f) Future periods of war	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.		38 U.S.C. 101(11)

§ 5.21 Service VA recognizes as active military service.

(a) Definition. Active military service includes any of the following kinds of service:

(1) Active duty: See § 5.22.

(2) The service of a person certified by the Secretary of Defense as serving on active military service. See § 5.27.

(3) The service of a group listed in § 5.28.

(4) Active duty for training during which the person was disabled or died from an injury or disease incurred or aggravated in the line of duty.

(5) Inactive duty training during which the person was disabled or died from an injury incurred or aggravated in the line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident.

(6) Active or Reserve duty for a person who was injured or died while assigned to the Postmaster General for the aerial transportation of mail from February 10, 1934, through March 26, 1935.

(Authority: Pub. L. 73-140, 48 Stat. 508)

(b) Determination of period of active military service. In determining the period of active military service for service-connected or nonservice-connected benefits, VA will not count:

(1) Time spent on industrial, agricultural, or indefinite furlough;

(2) Time lost when absent without leave and without pay;

(3) Time while under arrest without a subsequent acquittal or dismissal of charges;

(4) Time during desertion; or

(5) Subject to 10 U.S.C. 875 (concerning the restoration of rights, privileges, and property affected by certain court-marital sentences that are set aside or disapproved), time while serving a sentence of confinement imposed by a court-martial.

(Authority: 38 U.S.C. 101(24), 501(a).

CROSS REFERENCE: § 5.1(ee), for the definition of “reserve”.

§ 5.22 Service VA recognizes as active duty.

(a) Definition. Active duty means:

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

(2) Certain duty performed by:

(i) Reserve and National Guard members. See § 5.23.

(ii) Armed Services Academy cadets, midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members. See § 5.24.

(iii) Commissioned officers of the Public Health Service, Coast and Geodetic Survey and its successor agencies, and temporary members of the Coast Guard Reserves. See § 5.25.

(3) Certain service of persons ordered to service but who did not serve. See § 5.26.

(b) Termination of active duty. Active duty continues until midnight of the date of discharge or release from active duty.

(c) Certain travel periods. Active duty includes certain travel as provided in § 5.29.

(Authority: 38 U.S.C. 101(21))

CROSS REFERENCE: § 5.1, for the definition of "reserve".

§ 5.23 How VA classifies Reserve and National Guard duty.

(a) Reserve duty—(1) Active duty. Full-time duty in the Armed Forces performed by a Reservist, other than active duty for training, is active duty.

(2) Active duty for training. Full-time duty in the Armed Forces performed by a Reservist for training purposes is active duty for training.

(3) Inactive duty training. Duty that is not full-time duty and that the Secretary concerned prescribes for a Reservist to participate in as a regular period of instruction or appropriate duty is inactive duty training. See 37 U.S.C. 206, "Reserves; members of National Guard: inactive-duty training". Special additional duties authorized for a Reservist by an authority designated by the Secretary concerned and performed on a voluntary basis in connection with prescribed training maintenance activities of the unit to which the Reservist is assigned is also inactive duty training.

(b) National Guard—(1) Active duty. Full-time duty in the Armed Forces performed by a member of the National Guard serving under title 10, United States Code, other than active duty for training, is active duty.

(2) Active duty for training. Full-time duty performed by a member of the National Guard of any State under any of the following six circumstances is active duty for training:

(i) When detailed as a rifle instructor for civilians (see 32 U.S.C. 316);

(ii) During required drills and field exercises (see 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 504);

(v) While attending any service school (except the U.S. Military Academy or the U.S. Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise (see 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(2)(i) through (v) of this section.

(3) Inactive duty training. Duty, other than full-time duty, performed by a member of the National Guard of any State under any of the following six circumstances is inactive duty training:

(i) When detailed as a rifle instructor for civilians (see 32 U.S.C. 316);

(ii) During required drills and field exercises (see 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 504);

(v) While attending any service school (except the U.S. Military Academy or the U.S. Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise (see 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(3)(i) through (v) of this section.

(4) Exception. Inactive duty training does not include work or study performed in connection with correspondence courses, or attendance at an educational institution in an inactive status.

(c) Certain travel periods. For issues involving travel of a reservist or member of the National Guard, see § 5.29.

(Authority: 38 U.S.C. 101(21)–(23), 106, 501(a))

CROSS REFERENCE: § 5.1, for the definition of "reserve".

§ 5.24 How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.

(a) Service as a cadet or midshipman. Service as a cadet at the U.S. Air Force Academy, U.S. Military Academy, or U.S. Coast Guard Academy, or as a midshipman at the U.S. Naval Academy qualifies as active duty. The period of such duty continues until midnight of the date of discharge or release from the respective service academy.

(b) Preparatory school attendance—(1) Active duty. Attendance at the preparatory schools of the U.S. Air Force Academy, the U.S. Military Academy, or the U.S. Naval Academy is considered active duty if:

(i) The person was an enlisted active-duty member who was reassigned to a preparatory school without a release from active duty; or

(ii) The person has a commitment to perform active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school.

(2) Active duty for training. Except as provided in paragraph (b)(1)(ii) of this section, attendance at the preparatory schools of the U.S. Air Force Academy, the U.S. Military Academy, or the U.S. Naval Academy by a person who enters the preparatory school directly from the Reserves, National Guard, or civilian life is active duty for training.

(c) Senior Reserve Officers' Training Corps—(1) Active duty for training. Duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to duty for purpose of training or a practice cruise under statutes and regulations governing the Armed Forces conduct of the Senior Reserve Officers' Training Corps is active duty for training.

(Authority: 10 U.S.C. chapter 103)

(i) Paragraph (c)(1) of this section is effective October 1, 1982, for death or disability resulting from injury or disease incurred or aggravated after September 30, 1982.

(ii) Paragraph (c)(1) of this section is effective October 1, 1983, for death or disability resulting from injury or disease incurred or aggravated before October 1, 1982.

(iii) For duty after September 30, 1988, the duty must be a prerequisite to the member being commissioned and must be for at least 4 continuous weeks.

(2) Inactive duty training. Training by a member of, or an applicant for membership (a student enrolled, during a semester or other enrollment term, in a course that is part of Reserve Officers' Training Corps instruction at an educational institution) in, the Senior Reserve Officers' Training Corps prescribed under 10 U.S.C. Chapter 103, "Senior Reserve Officers' Training Corps", is inactive duty training.

(3) Drills. Time spent by a member of the Senior Reserve Officers' Training Corps in drills as part of his or her activities as a member of the corps is not active military service.

(d) Travel. For issues involving travel under this section, see § 5.29..

(Authority: 38 U.S.C. 101, 106, 501(a))

CROSS REFERENCE: § 5.1, for the definition of "reserve".

§ 5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.

(a) Public Health Service—(1) Active duty. (i) Full-time duty, other than for training purposes, as a commissioned officer of the Regular or Reserve Corps of the Public Health Service is active duty if performed:

(A) After July 28, 1945;

(B) Before July 29, 1945, under circumstances affording entitlement to full military benefits; or

(C) At any time, for purposes of dependency and indemnity compensation (DIC).

(ii) Such active duty continues until midnight of the date of discharge or release from active duty.

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

(i) After July 28, 1945;

(ii) Before July 29, 1945, under circumstances affording entitlement to full military benefits, as determined by the Secretary of the Department of Defense; or

(iii) At any time, for purposes of DIC.

(3) Inactive duty training. Either of the following kinds of service is inactive duty training:

(i) Duty, other than full-time duty, prescribed for a commissioned officer of the Reserve Corps of the Public Health Service by the Secretary of Health and Human Services under 37 U.S.C. 206, “Reserves; members of National Guard: inactive-duty training”, or any other provision of law; or

(ii) Special additional duties authorized for a commissioned officer of the Reserve Corps of the Public Health Service by an authority designated by the Secretary of Health and Human Services and performed by him or her on a voluntary basis in

connection with the prescribed training or maintenance activities of the units to which he or she is assigned.

(b) Coast and Geodetic Survey and successor agencies—(1) Active duty. Full-time duty as a commissioned officer in the Coast and Geodetic Survey and its successor agencies, the Environmental Science Services Administration and the National Oceanic and Atmospheric Administration, is active duty if performed:

(i) After July 28, 1945;

(ii) Before July 29, 1945, while on transfer to one of the Armed Forces;

(iii) Before July 29, 1945, in time of war or National emergency declared by the President, while assigned to duty on a project for one of the Armed Forces in an area that the Secretary of Defense has determined to be of immediate military hazard;

(iv) In the Philippine Islands on December 7, 1941, and continuously in such islands thereafter until July 29, 1945; or

(v) At any time, for purposes of DIC.

(2) Such active duty continues until midnight of the date of discharge or release from active duty.

(c) Temporary member of the Coast Guard Reserve. Duty performed as a temporary member of the Coast Guard Reserve is not active duty for training or inactive duty training.

(d) Travel. For issues involving travel by a member of the Public Health Service, a member of the Coast and Geodetic Survey and its successor agencies, or a reservist under this section, see § 5.29.

(Authority: 38 U.S.C. 101, 106, 501(a))

CROSS REFERENCE: § 5.1, for the definitions of “reserve” and “reservist”.

§ 5.26 Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.

(a) Persons included. The persons described in paragraph (a) of this section who meet the requirements of paragraphs (a) and (b) of this section will be considered to have performed active duty for purpose of entitlement to benefits.

(1) Volunteers. Volunteers are included, provided they have applied for enlistment or enrollment in the active military service and have been provisionally accepted and directed or ordered to report to a place for final acceptance into the service.

(2) Draftees. Persons selected or drafted for enrollment in the active military service are included if they report, before being rejected for service, according to a call from their local draft board.

(3) National Guard. Members of the National Guard are included when they have been called into Federal active service, but have not yet been enrolled in such service, and when reporting to a designated rendezvous.

(b) Injury or disease. This section applies only if a person described in paragraph (a) of this section suffers an injury or contracts a disease in the line of duty while going to, coming from, or at a place designated for final acceptance or entry upon active duty. This applies to a draftee or selectee when reporting for preinduction examination or for final induction into active duty. This section does not apply to an injury or disease suffered during a period of inactive duty status or period of waiting after a final physical examination and prior to beginning the trip to report for induction. The injury or disease must be due to some factor relating to compliance with proper orders.

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

§ 5.27 Individuals and Groups that Qualify as Having Performed Active Military Service for purposes of VA Benefits Based on Designation by the Secretary of Defense.

(a) Designation by the Secretary of Defense. Service performed by certain persons and groups for the Armed Forces of the U.S. in a capacity considered civilian employment or contractual service when the service was performed is active military service for purpose of VA benefits, if the Secretary of Defense, or his or her designee, certifies it as active military service and issues a discharge under honorable conditions.

(b) Individuals and groups included. The Secretary of Defense, or his or her designee, has certified as active military service the service of the following individuals and groups:

(1) American Merchant Marine in Oceangoing Service any time during the period December 7, 1941, to August 15, 1945. Recognized effective January 19, 1988.

(2) The approximately 50 Chamorro and Carolinian former native policemen who received military training in the Donnal area of central Saipan and were placed under the command of Lt. Casino of the 6th Provisional Military Police Battalion to accompany U.S. Marines on active, combat-patrol activity any time during the period August 19, 1945 to September 2, 1945. Recognized effective September 30, 1999.

(3) Civilian Crewmen of the U.S. Coast and Geodetic Survey (U.S.C.GS) vessels, who performed their service in areas of immediate military hazard while conducting cooperative operations with and for the U.S. Armed Forces any time during the period December 7, 1941, to August 15, 1945. Qualifying U.S.C.GS vessels specified by the Secretary of Defense, or his or her designee, are the Derickson, Explorer, Gilbert, Hilgard, E. Lester Jones, Lydonia, Patton, Surveyor, Wainwright, Westdahl, Oceanographer, Hydrographer, and Pathfinder. Recognized effective April 8, 1991.

(4) Civilian employees of Pacific Naval Air Bases who actively participated in Defense of Wake Island during World War II. Recognized effective January 22, 1981.

(5) Civilian Navy Identification Friend or Foe (IFF) Technicians, who served in the Combat Areas of the Pacific any time during the period December 7, 1941, to August 15, 1945. Recognized effective August 2, 1988.

(6) Civilian personnel assigned to the Secret Intelligence Element of the Office of Strategic Services (OSS). Recognized effective December 27, 1982.

(7) Engineer Field Clerks (WWI). Recognized effective August 31, 1979.

(8) Guam Combat Patrol. Recognized effective May 10, 1983.

(9) Honorably discharged members of the American Volunteer Group (Flying Tigers), who served any time during the period December 7, 1941, to July 18, 1942. Recognized effective May 3, 1991.

(10) Honorably discharged members of the American Volunteer Guard, Eritrea Service Command, who served any time during the period June 21, 1942, to March 31, 1943. Recognized effective June 29, 1992.

(11) Male Civilian Ferry Pilots. Recognized effective July 17, 1981.

(12) The Operational Analysis Group of the Office of Scientific Research and Development, Office of Emergency Management, which served overseas with the U.S. Army Air Corps any time during the period December 7, 1941, to August 15, 1945. Recognized effective August 27,1999.

(13) Quartermaster Corps Female Clerical Employees serving with the AEF (American Expeditionary Forces) in World War I. Recognized effective January 22, 1981.

(14) Quartermaster Corps Keswick Crew on Corregidor (WWII). Recognized effective February 7, 1984.

(15) Reconstruction Aides and Dietitians in World War I. Recognized effective July 6, 1981.

(16) Signal Corps Female Telephone Operators Unit of World War I. Recognized effective May 15, 1979.

(17) Three scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the U.S. Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945. Recognized effective September 30, 1999.

(18) U.S. civilian employees of American Airlines, who served overseas as a result of American Airlines' contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. Recognized effective October 5, 1990.

(19) U.S. civilian female employees of the U.S. Army Nurse Corps while serving in the defense of Bataan and Corregidor any time during the period January 2, 1942, to February 3, 1945. Recognized effective December 13, 1993.

(20) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, who served overseas in the North Atlantic or under the jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a result of a contract with the ATC any time during the period February 26, 1942, to August 14, 1945. Recognized effective June 2, 1997.

(21) 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 any time during the period December 14, 1941, to August 14, 1945. Recognized effective June 29, 1992.

(22) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, who served overseas as a result of Northeast Airlines' Contract with the Air Transport Command any time during the period December 7, 1941, to August 14, 1945. Recognized effective June 2, 1997.

(23) 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 any time during the period December 14, 1941, to August 14, 1945. Recognized effective December 13, 1993.

(24) 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 any time during the period December 14, 1941, to August 14, 1945. Recognized effective July 16, 1992.

(25) 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 any time during the period December 14, 1941, to August 14, 1945. The "Flight Crew" includes pursers. Recognized effective May 13, 1992.

(26) 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 any time during the period December 14, 1941, to August 14, 1945. Recognized effective May 13, 1992.

(27) U.S. civilian volunteers, who actively participated in the Defense of Bataan. Recognized effective February 7, 1984.

(28) U.S. civilians of the American Field Service (AFS), who served overseas operationally in World War I any time during the period August 31, 1917, to January 1, 1918. Recognized effective August 30, 1990.

(29) 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 any time during the period December 7, 1941, to May 8, 1945. Recognized effective August 30, 1990.

(30) U.S. Merchant Seamen who served on blockships in support of Operation Mulberry. Recognized effective October 18, 1985.

(31) Wake Island Defenders from Guam. Recognized effective April 7, 1982.

(32) Women's Air Forces Service Pilots (WASP). Recognized effective November 23, 1977.

(33) Women's Army Auxiliary Corps (WAAC). Recognized effective March 18, 1980.

(c) Effective dates of awards—(1) Scope. This paragraph (c) establishes the effective date of an award of any of the following benefits based on service in a group listed in this section:

(i) Pension;

(ii) Disability compensation;

(iii) Dependency and indemnity compensation; and

(iv) Monetary allowances for a child of:

(A) A Vietnam veteran under § 5.589;

(B) A Vietnam veteran under § 5.590; or

(C) A veteran of covered service in Korea under 38 U.S.C. 1821, "Benefits for a child of certain Korea service veterans born with spina bifida".

(2) Claim received 1 year or less after the effective date of recognition. If VA receives the claim no later than 1 year after the effective date of recognition, then the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) The effective date of recognition.

(3) Claim received more than 1 year after the effective date of recognition. If VA receives the claim more than 1 year after the effective date of recognition, the effective date of the award or increase is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) One (1) year prior to the date of receipt of the claim.

(4) Effective dates of awards based on a review on VA's initiative 1 year or less after the effective date of recognition. If VA awards benefits no later than 1 year after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) The effective date of recognition.

(5) Effective dates of awards based on a review on VA's initiative more than 1 year after the effective date of the change. If VA awards benefits more than 1 year after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) One (1) year before the date of the VA rating decision awarding the benefit, or if no rating decision is required, 1 year before the date VA otherwise determines that the claimant is entitled to the benefit.

(Authority: 38 U.S.C. 501(a), 1832(b)(2), 5110(g); Sec. 401, Pub. L. 95-202, 91 Stat. 1449-50)

§ 5.28 Other groups designated as having performed active military service.

The following groups are considered to have performed active military service:

(a) Alaska Territorial Guard during World War II. (1) Service in the Alaska Territorial Guard during World War II, for any person who the Secretary of Defense determines was honorably discharged, is included.

(2) Benefits cannot be paid for this service for any period prior to August 9, 2000.

(b) Army field clerks. Army field clerks are included as enlisted personnel.

(c) Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel. Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel are included, as follows:

(1) Nurse Corps. Female Army and Navy nurses on active service under order of the service department; or

(2) Female dietetic and physical therapy personnel. Female dietetic and physical therapy personnel, excluding students and apprentices, appointed with relative rank after December 21, 1942, or commissioned after June 21, 1944.

(d) Aviation camps. Students who were enlisted men in Aviation camps during World War I are included.

(e) Coast Guard. Active service in the Coast Guard after January 27, 1915, while under the jurisdiction of the Treasury Department, the Navy Department, the Department of Transportation, or the Department of Homeland Security is included. This does not include temporary members of the Coast Guard Reserves.

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

(g) Field clerks, Quartermaster Corps. Field clerks of the Quartermaster Corps are included as enlisted personnel.

(h) Lighthouse service personnel. Lighthouse service personnel who were transferred to the service and jurisdiction of the War or Navy Departments by Executive

order under the Act of August 29, 1916, are included. Effective July 1, 1939, service was consolidated with the Coast Guard.

(i) Male nurses. Male nurses who were enlisted in a Medical Corps are included.

(j) Persons previously having a pensionable or compensable status. Persons having a pensionable or compensable status before January 1, 1959, are included.

(k) Insular Forces—(1) Philippine forces. Service in certain Philippine forces constitutes active military service for purposes of certain benefits as specified in § 5.610.

(2) Other insular forces. Service in the Insular Force of the Navy, Samoan Native Guard, or Samoan Native Band of the Navy constitutes active military service for purposes of entitlement to pension, disability compensation, dependency and indemnity compensation, and burial benefits at the full-dollar rate.

(l) Revenue Cutter Service. The Revenue Cutter Service is included while serving under direction of the Secretary of the Navy in cooperation with the Navy. Effective January 28, 1915, the Revenue Cutter Service was merged into the Coast Guard.

(m) Russian Railway Service Corps. Service during World War I in the Russian Railway Service Corps as certified by the Secretary of the Army is included.

(n) Training camps. Members of training camps authorized by section 54 of the National Defense Act (Pub. L. 64-85, 39 Stat. 166), are included, except for 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.

(o) Women's Army Corps (WAC). Service in the WAC after June 30, 1943, is included.

(p) Women's Reserve of Navy, Marine Corps, and Coast Guard. Service in the Women's Reserve of the Navy, Marine Corps, and Coast Guard is included and provides the same benefits as members of the Officers Reserve Corps or enlisted men of the U.S. Navy, Marine Corps, or Coast Guard.

(Authority: 38 U.S.C. 101, 106, 107, 501(a), 1152, 1504)

CROSS REFERENCE: § 5.1, for the definition of "reserve".

§ 5.29 Circumstances under which certain travel periods may be classified as military service.

(a) Active duty—(1) Travel time to and from active duty. Travel to or from any period of active duty is active duty if the travel is authorized by the Secretary concerned.

(2) Travel on discharge or release. Travel time consisting of the period between the date of discharge or release and arrival at the person's residence by the most direct route is active duty.

(3) Persons ordered to service but who did not serve. For information about the travel of certain persons ordered to service who did not serve, see § 5.26(b).

(b) Active duty for training or inactive duty training—(1) Travel time for active duty for training or inactive duty training. Any person proceeding directly to, or returning directly from, a period of active duty for training or inactive duty training will be considered to be on active duty for training or inactive duty training if the person was:

(i) Authorized or required by competent authority designated by the Secretary concerned to perform such duty; and

(ii) Disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel.

(2) Determination of status. VA will determine whether such a person was authorized or required to perform such duty and whether the person was disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel. In making these determinations, VA will take into consideration:

(i) The hour at which the person began to proceed to or return from the duty;

(ii) The hour at which the person was scheduled to arrive for, or at which the person ceased to perform, such duty;

(iii) The method of travel employed;

(iv) The itinerary;

(v) The manner in which the travel was performed; and

(vi) The immediate cause of disability or death.

(3) Burden of proof. Whenever any claim is filed alleging that the claimant is entitled to benefits because of travel for active duty for training or inactive duty training, the burden of proof will be on the claimant.

(Authority: 38 U.S.C. 101(21) and (22), 106(c) and (d))

§ 5.30 How VA determines if service qualifies for benefits.

(a) Purpose. Except for a servicemember who died in service, a requirement for veteran status is discharge or release under other than dishonorable conditions. See § 5.1 (defining "veteran"). This section sets out how VA determines whether the servicemember's discharge or release was under other than dishonorable conditions.

(b) Limitation to period of service concerned—(1) General rule. A determination under this section that a servicemember was discharged or released under dishonorable conditions applies only to the period of service to which the discharge or release applies. It does not preclude veteran status with respect to other periods of service from which the servicemember was discharged or released under other than

dishonorable conditions. See also § 5.37 (concerning certain cases where a servicemember was not discharged or released at the end of the period of time for which he or she was obligated to serve when entering a period of service because of a change in his or her military status during that period of service).

(2) Forfeiture not precluded. The provisions of paragraph (b)(1) of this section do not preclude forfeiture of benefits under 38 U.S.C. 6103, "Forfeiture for fraud"; under 38 U.S.C. 6104, "Forfeiture for treason"; under 38 U.S.C. 6105, "Forfeiture for subversive activities"; or under similar statutes governing forfeiture of benefits.

(c) Discharges and releases VA recognizes as being under other than dishonorable conditions. For purposes of making determinations concerning character of discharge for VA purposes, a military discharge that is characterized by the service department as being either honorable or under honorable conditions is binding on VA. Subject to § 5.36 any of the following is a discharge or release under other than dishonorable conditions for VA purposes:

(1) An honorable discharge;

(2) A general discharge under honorable conditions; or

(3) An uncharacterized administrative entry level separation in the case of separation of enlisted personnel based on administrative proceedings begun after September 30, 1982.

(d) Discharges VA recognizes as being under dishonorable conditions. For VA purposes, a dishonorable discharge is a discharge under dishonorable conditions, except as provided in § 5.33.

(e) Discharges and releases for which VA will make the character of discharge determination. Subject to § 5.36, VA will determine whether the following types of discharges are discharges under other than dishonorable conditions for VA purposes, based on the facts and circumstances surrounding separation:

(1) An other than honorable discharge (formerly an “undesirable” discharge);

(2) A bad conduct discharge; or

(3) In the case of separation of enlisted personnel based on administrative proceedings begun after September 30, 1982, uncharacterized administrative separations for:

(i) A void enlistment or induction; or

(ii) Dropped from the rolls (that is, administrative discontinuance of military status and pay).

(f) Offenses or events leading to discharge or release being recognized as a discharge under dishonorable conditions. For purposes of VA’s character of discharge determination under paragraph (e) of this section, a discharge or release because of one or more of the offenses or events specified in this paragraph (f) is a discharge or release under dishonorable conditions for VA purposes:

(1) Acceptance of an other than honorable discharge (formerly an “undesirable” discharge) to avoid trial by general court-martial.

(2) Mutiny or spying.

(3) Commission of one or more offenses involving moral turpitude. For purposes of this section, an offense involves “moral turpitude” if it is unlawful, it is willful, it is committed without justification or legal excuse, and it is an offense which a reasonable person would expect to cause harm or loss to person or property. This includes, generally, conviction of a felony.

(4) Engaging in willful and persistent misconduct during military service. A discharge because of a minor offense will not be considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious. If the misconduct includes absences without leave, see also § 5.32.

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

(Authority: 38 U.S.C. 101(2), 501(a), 1301)

CROSS REFERENCE: § 5.1, for the definition of “willful misconduct”.

§ 5.31 Statutory bars to benefits.

(a) Purpose. By Federal statute, commission of certain acts leading to discharge or dismissal from the Armed Forces bars the grant of benefits (statutory bars). This section describes those acts and exceptions to the statutory bars.

(b) Limitation to period of service concerned—(1) General rule. A determination under this section that veterans benefits are statutorily barred applies only to the period of service to which the relevant discharge or dismissal applies. It does not preclude the grant of benefits based upon other periods of service. See also § 5.37 (concerning certain cases in which a servicemember was not discharged or released at the end of a period of his or her service obligation because of a change in his or her military status during that period of service).

(2) Forfeiture not precluded. The provisions of paragraph (b)(1) of this section do not preclude forfeiture of benefits under 38 U.S.C. 6103, “Forfeiture for fraud”; under 38 U.S.C. 6104, “Forfeiture for treason”; under 38 U.S.C. 6105, “Forfeiture for subversive activities”; or under similar statutes governing forfeiture of benefits.

(c) Acts barring benefits. Benefits are not payable based upon a period of service from which the servicemember was discharged or dismissed from the Armed Forces under one or more of the following conditions:

(1) Court-martial. By reason of the sentence of a general court-martial. Substitution of an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial under 10 U.S.C. 874(b) (granting the authority for such substitutions) does not remove this bar to benefits.

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

(3) Deserter. As a deserter.

(4) Absence without leave (AWOL). By reason of AWOL for a continuous period of at least 180 days. This bar is subject to § 5.32 and to paragraph (f) of this section (concerning limitations on the creation of overpayments). It applies to any person so discharged who was awarded a discharge under other than honorable conditions and who:

(i) Was awarded an honorable or general discharge under one of the programs listed in § 5.36(a) (concerning certain special 1970s-era discharge upgrades) prior to October 8, 1977; or

(ii) Had not otherwise established basic eligibility to receive VA benefits prior to October 8, 1977. For purposes of this paragraph (c)(4)(ii), the term established basic eligibility to receive VA benefits means either a VA determination that the service department issued an other than honorable discharge 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 § 5.36. However, if the service department discharged or released a person by reason of the

sentence of a general court-martial, only a finding of insanity (see § 5.33), or a decision of a board of correction of records established under 10 U.S.C. 1552 (see § 5.34) can establish basic eligibility to receive VA benefits.

(5) Resignation. By reason of resignation by an officer for the good of the service.

(6) Discharge due to alienage. At the request of a servicemember, by reason of discharge due to alienage during a period of hostilities. However, VA will not bar benefits in the absence of affirmative evidence establishing such a request.

(d) Bars inapplicable to certain insurance. This section does not apply to war-risk insurance, Government (converted) insurance, or National Service Life Insurance policies.

(e) Discontinuance of awards. Subject to the provisions of § 5.177, any award contrary to the provisions of paragraph (c) of this section will be discontinued.

(f) Limitation on creation of overpayments when veteran was separated for AWOL. Awards made after October 8, 1977, in cases in which the bar in paragraph (c)(4) of this section applies, will be discontinued effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 501(a), 5303; Pub. L. 95-126, 91 Stat. 1106, as amended by Pub. L. 102-40, 105 Stat. 239)

CROSS REFERENCE: § 5.1, for the definition of “alien” and § 5.1, for the definition of “insanity”.

§ 5.32 Consideration of compelling circumstances when veteran was separated for AWOL.

(a) Compelling circumstances considered. Separation for absence without leave (AWOL) will not preclude veteran status under § 5.30, and will not bar benefit entitlement under § 5.31(c)(4) (concerning AWOL as a statutory bar to benefits) if VA determines that there were compelling circumstances to warrant unauthorized absence(s).

(b) Factors considered. VA will evaluate all of the relevant evidence of record to determine whether there were compelling circumstances to warrant unauthorized absence(s), including, but not limited to, the following factors:

(1) Length of absence without leave and character of service. VA will consider the length of the period(s) of AWOL in comparison to the length and character of service exclusive of the period(s) of AWOL. Service exclusive of the period(s) of AWOL should have been of such quality and length that it can be characterized as honest, faithful, meritorious, and of benefit to the nation.

(2) Examples of circumstances VA will consider. Reasons offered for being AWOL that VA will consider include family emergencies, compelling family obligations, or similar types of compelling obligations or duties owed to third parties. In evaluating the reasons for being AWOL, VA will consider how the situation appeared to the

servicemember in light of the servicemember's age, cultural background, educational level, and judgmental maturity. VA will also consider evidence showing that hardship or suffering during overseas service, combat wounds or other service-incurred or aggravated disability, adversely affected the servicemember's state of mind at the time AWOL began.

(3) Valid legal defense. VA may find that compelling circumstances existed if the absence could not have been validly charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice.

(Authority: 38 U.S.C. 501(a), 5303(a))

§ 5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for benefits.

If VA determines that a servicemember was insane at the time of the commission of an act, or acts, leading to separation from the service, the commission of such act(s) will not be a basis for denying status as a veteran under § 5.30, or for barring the payment of benefits under § 5.31.

(Authority: 38 U.S.C. 501(a), 5303(b))

CROSS REFERENCE: § 5.1, for the definition of "insanity".

§ 5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.

(a) Purpose. This section describes the effect of a discharge upgrade by a board established under 10 U.S.C. 1552, "Correction of military records: claims incident thereto" on a VA determination that a servicemember's discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving VA benefits.

(b) Definitions. For purposes of this section, any applicable new determination means a determination under § 5.30 or § 5.31. Applicable previous VA discharge findings means findings by VA, based upon a previous discharge issued for the same period of service, that a servicemember's discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving benefits.

(c) Effect of discharge upgrades. An honorable discharge, or discharge under honorable conditions, issued through a board for correction of military records is final and conclusive and is binding on VA as to characterization based on the period covered by such service. Such a discharge supersedes a previous discharge issued for the same period of service. It will be the basis for making any applicable new determination and sets aside any applicable previous VA discharge findings.

(d) Effective date. If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a board for the correction of military records, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the request for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or a previously denied claim filed with VA;

(2) The date VA received a previously denied claim; or

(3) One (1) year prior to the date of reopening of the previously denied VA claim.

(Authority: 10 U.S.C. 1552(a)(4); 38 U.S.C. 501(a), 5110(i))

§ 5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.

(a) Purpose. This section describes the effect of a discharge upgrade by a board established under 10 U.S.C. 1553, “Review of discharge or dismissal” on a VA determination that a servicemember’s discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving VA benefits.

(b) Upgrades issued before October 8, 1977. This paragraph (b) concerns the effect of an honorable or general discharge (upgraded discharge) issued by a discharge review board before October 8, 1977.

(1) General rule. The upgraded discharge will be the basis for making any new determination under § 5.30 or § 5.31. The upgraded discharge will also set aside any VA finding that a servicemember's discharge or dismissal was under dishonorable conditions, or that he or she is statutorily barred from receiving benefits, if the upgraded discharge concerned the same period of service.

(2) Exception. The rule in paragraph (b)(1) of this section does not apply if:

(i) The previous discharge was executed by reason of the sentence of a general court-martial, or

(ii) The discharge review board was acting under the authority of one of the programs specified in § 5.36.

(c) Upgrades issued after October 7, 1977—effect on statutory bars. VA will make any new determinations under § 5.31 without regard to an honorable or general discharge (upgraded discharge) that a discharge review board issued after October 7, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same period of service, that a servicemember is statutorily barred from receiving VA benefits.

(d) Upgrades issued after October 7, 1977—effect on character of discharge determinations—(1) General rule. Any new determinations VA makes under § 5.30 will be made without regard to an honorable or general discharge (upgraded discharge) issued by a discharge review board after October 7, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same

period of service, that a servicemember's discharge or dismissal was under dishonorable conditions.

(2) Exceptions. The rule in paragraph (d)(1) of this section does not apply if all of the following conditions are met:

(i) The discharge was upgraded as a result of an individual case review;

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

(iii) Such published standards are consistent with standards for determining honorable service historically used by the service department concerned and do not contain any provision for automatically granting or denying an upgraded discharge. VA will accept a report of the service department concerned that the discharge review board proceeding met these conditions.

(e) Effective date. If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a discharge review board, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the request for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or a previously denied claim filed with VA;

(2) The date VA received a previously denied claim; or

(3) One (1) year before the date of reopening of the previously denied VA claim.

(Authority: 38 U.S.C. 501(a), 5110(i), 5303(e))

§ 5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.

(a) Programs involved. Except as provided in § 5.35(d)(2), an honorable or general discharge awarded by a discharge review board under one of the following programs does not remove any bar to benefits imposed under § 5.30 or § 5.31:

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

(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.

(b) Discontinuance of awards. Subject to the provisions of § 5.177, any award of benefits made contrary to paragraph (a) of this section will be discontinued.

(c) No overpayments to be created. No overpayments will 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 (a) of this section which would not be awarded under the standards set forth in § 5.35(d)(2). Such payments will

be discontinued effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 5303(e); Pub. L. 95-126, 91 Stat. 1106)

§ 5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.

(a) Purpose. Except for persons who die in military service, status as a veteran requires that a servicemember be discharged or released from active military service under conditions other than dishonorable. See § 5.1, defining "veteran". This section describes how VA will determine whether a servicemember has met this requirement when, because of a change in his or her military status, he or she was not discharged or released at the end of the period of time for which he or she was initially obligated to serve.

(b) Definitions—(1) Change in military status. For purposes of this section, a change in military status means a change in status that extends the period that a servicemember is obligated to serve. Examples of such a change in military status include, but are not limited to:

(i) A discharge for acceptance of an appointment as a commissioned officer or warrant officer;

(ii) Change from a Reserve commission to a Regular commission;

(iii) Change from a Regular commission to a Reserve commission;

(iv) Reenlistment; or

(v) Voluntary or involuntary extensions of a period of obligated service.

(2) Combined periods of service. For purposes of this section, combined periods of service means the period of service immediately prior to the change in military status combined with the period of service immediately following the change in military status.

(c) Combined periods of service ending under conditions other than dishonorable. If the combined periods of service ended with discharge or release under conditions other than dishonorable, then VA will consider the entire period of service as other than dishonorable.

(d) Combined periods of service ending under dishonorable conditions. When a servicemember's combined period of service ended under dishonorable conditions and he or she was not discharged or released at the end of the period that he or she was initially obligated to serve, he or she is eligible to receive VA benefits based on that period of service if that servicemember:

(1) Completed active military service for the period he or she was initially obligated to serve; and

(2) Due to an intervening change in military status was not discharged or released at the end of the initial period but would have been eligible for a discharge or release under conditions other than dishonorable at the end of the initial period if not for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

CROSS REFERENCE: § 5.1, for the definition of “reserve”.

§ 5.38 Effect of a voided enlistment on eligibility for VA benefits.

(a) Purpose. This section describes whether a claimant is eligible for VA benefits if the service department has voided the servicemember’s enlistment.

(b) Service considered valid for establishing eligibility for benefits. A servicemember’s enlistment that is voided by the service department for reasons other than those stated in paragraph (c) of this section is valid from the date of entry upon active duty to the date of voidance by the service department. In the case of an enlistment voided for concealment of age or misrepresentation of age, service is valid from the date of entry upon active duty to the date of discharge.

(c) Service considered not valid for establishing eligibility for benefits. A servicemember’s enlistment that is voided by the service department for any of the reasons specified in this paragraph (c) is void from the date of entry. A servicemember is not eligible for VA benefits based on this period of service, if enlistment was voided for any of the following reasons:

(1) Lack of legal capacity to contract, other than on the basis of minority, such as a lack of mental capacity to contract; or

(2) A statutory prohibition to enlistment, including, but not limited to:

(i) Desertion; or

(ii) Conviction of a felony.

(Authority: 10 U.S.C. 501(a), 505; 38 U.S.C. 101(2), 501(a))

MINIMUM SERVICE AND EVIDENCE OF SERVICE

§ 5.39 Minimum active duty service requirement for VA benefits.

(a) Requirement. Any person listed in paragraph (b) of this section will not be eligible for VA benefits based on a particular period of active duty service unless that period of service met the requirement for a minimum period of active duty described in paragraph (c) of this section, or the person qualifies for an exclusion under paragraph (d) of this section.

(b) Applicability. The minimum active duty service requirement applies to:

(1) Any person who originally enlisted in a regular component of the Armed Forces and entered on active duty after September 7, 1980 (time spent during temporary assignment to a reserve component awaiting entrance on active duty because of a delayed entry enlistment contract does not count; this section applies if the actual date of entry on active duty is after September 7, 1980); and

(2) Any other person (enlisted or officer) who entered on active duty after October 16, 1981, who had not previously completed a continuous period of active duty of at least 24 months.

(c) Minimum active duty service requirement. (1) Except for persons excluded in paragraph (d) of this section, a person must have served the shorter of:

(i) Twenty-four (24) months of continuous active duty; or

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

(2) If it appears that a person has not met the length of service requirement, VA will request service department records to determine if any of the exclusions described in paragraph (d) of this section apply.

(d) Exclusions. The minimum active duty service requirement of this section does not apply to:

(1) Any person who was discharged under an early out program described in 10 U.S.C. 1171.

(2) Any person who was discharged because of a hardship as described in 10 U.S.C. 1173.

(3) Any person who was discharged or released from active duty because of a disability incurred or aggravated in the line of duty:

(i) That, at the time of discharge or release, was determined to be service connected without presumptive provisions of law; or

(ii) That, at the time of discharge, was documented in official service records and, in VA's medical judgment, would have justified a discharge.

(4) Any person who has any disability that is currently compensable under 38 U.S.C. chapter 11 because:

(i) VA evaluates the disability as 10 percent or more disabling according to the Schedule for Rating Disabilities in part 4 of this chapter;

(ii) Special monthly compensation is payable for the disability; or

(iii) The disability, together with one or more other disabilities, is compensable under § 5.282 for paired organs and extremities, of this chapter.

(5) The provision of a benefit for or in connection with a service-connected disability, condition, or death.

(6) Insurance benefits under 38 U.S.C. chapter 19.

(7) Any person who performed active military service under the provisions of § 5.21(a)(4) or (5), VA recognizes as active military service.

(e) Temporary breaks in service. Temporary breaks in active duty service for any of the reasons listed below will not be considered to have interrupted the "continuous service" requirement of paragraph (c)(1)(i) of this section; however, time lost due to these breaks must be subtracted from the total service time because these times do not count towards the minimum active duty service requirement:

(1) Time lost due to an industrial, agricultural, or indefinite furlough;

(2) Time lost while absent without leave and without pay;

(3) Time lost while under arrest (without acquittal or a dismissal of charges);

(4) Time lost while a deserter; or

(5) Subject to 10 U.S.C. 875(a) (concerning the restoration under certain circumstances of "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved"), time lost while serving a court-martial sentence.

(f) Effect on eligibility for benefits for survivors and dependents—(1) General rule. If a person is ineligible for VA benefits because he or she did not meet the minimum active duty service requirement, the person's dependents and survivors are ineligible for benefits based on that service.

(2) Exceptions. Paragraph (f)(1) of this section does not bar entitlement to any of the following VA benefits to which a dependent or survivor may otherwise be entitled:

(i) Insurance benefits under 38 U.S.C. chapter 19;

(ii) Housing or small business loans under 38 U.S.C. chapter 37;

(iii) Benefits described in paragraph (d)(5) of this section; or

(iv) Dependency and indemnity compensation based on the person's death in service.

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

CROSS REFERENCE: § 5.1, for the definition of "reserve component".

§ 5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.

(a) Acceptable evidence of service. To establish entitlement to pension, disability compensation, dependency and indemnity compensation, or burial benefits, VA must have evidence of qualifying service and character of discharge from the service department concerned. Documents VA will accept as evidence of service and character of discharge include, but are not limited to, the following documents:

(1) A DD Form 214; or

(2) A Certificate of Release or Discharge from Active Duty.

(b) Content of documents. The document establishing service must contain information which demonstrates:

(1) The length of service;

(2) The dates of service; and

(3) The character of discharge or release.

(c) When service department verification is not required. VA will accept one or more documents issued by a U.S. service department as evidence of service and character of discharge without verifying their authenticity, provided that VA determines that the document is genuine and accurate. The document can be a copy of an original document if the copy:

(1) Was issued by a service department;

(2) Is certified by a public custodian of records as a true and exact copy of a document in the custodian's possession; or

(3) Is certified by an accredited agent, attorney, or service organization representative as a true and exact copy of either an original document or of a copy issued by the service department or a public custodian of records. This accredited agent, attorney, or service organization representative must have successfully completed VA-prescribed training on military records.

(d) When service department verification is required. VA will request verification of service from the appropriate service department if:

(1) The record does not include satisfactory evidence showing the information described in paragraph (b) of this section;

(2) The evidence of record does not meet the requirements of paragraph (c) of this section; or

(3) There is a material discrepancy in the evidence of record.

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

§§ 5.41–5.49 [Reserved]

Subpart C—Adjudicative Process, General

VA BENEFIT CLAIMS

§ 5.50 Applications VA furnishes.

(a) VA will furnish an application upon request. Upon request, VA will furnish the appropriate application to a person claiming, or expressing intent to claim, benefits under the laws administered by VA.

(b) VA will furnish an application to a survivor upon the death of a veteran. Upon the receipt of information of the death of a veteran, VA will furnish the appropriate application to any survivor with apparent entitlement to death pension or dependency and indemnity compensation (DIC). If the available evidence does not indicate that any person has apparent entitlement to death pension or DIC, but an accrued benefit is payable, VA will furnish the appropriate application to the preferred survivor. The letter accompanying the application will state that the claimant has 1 year after the date of the veteran's death to file a claim for accrued benefits, in accordance with § 5.552.

(c) Claims under 38 U.S.C. 1151. A claimant may apply in any written form for disability or death benefits due to hospital treatment, medical or surgical treatment, examination, or training under the provisions of 38 U.S.C. 1151. VA does not have an application for such a claim. See § 5.53 for the requirements for filing a claim pursuant to 38 U.S.C. 1151.

(Authority: 38 U.S.C. 501(a), 5101, 5102)

§ 5.51 Filing a claim for disability benefits.

(a) Requirements for claims for disability benefits. A person must file a specific claim that is in the form prescribed by the Secretary for VA to grant a claim for disability benefits. If an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form. For purposes of this section, the term mentally incompetent means that the individual lacks the mental capacity to provide substantially accurate information needed to complete a form or to certify that the statements made on a form are true and complete.

(b) Effect of claims for disability compensation or pension. VA may consider a claim for disability compensation as a claim for pension, and VA may consider a claim for pension as a claim for disability compensation. VA will award the greater benefit, unless the claimant specifically elects the lesser benefit.

(Authority: 38 U.S.C. 501(a), 5101(a))

CROSS REFERENCE: §§ 5.1, for the definition of “claim”; 5.54, “Informal claims”.

§ 5.52 Filing a claim for death benefits.

(a) Requirements for claims for death benefits. A person must file a specific claim for death benefits by completing and filing the application prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by § 5.131(a)), or on any document indicating an intent to apply for survivor benefits, for VA to grant death benefits. See §§ 5.431 and 5.538.

(Authority: 38 U.S.C. 501(a), 5101(a))

(b) Effects of claims for death benefits. A surviving spouse's or a child's claim:

(1) For DIC is also a claim for death pension; and

(2) For death pension is also a claim for DIC.

(Authority: 38 U.S.C. 501(a), 5101(b)(1))

(c) Claims for death benefits filed by or for a child—(1) Child turns 18 years old. If a child's entitlement to DIC arises because the child turns 18 years old, the child must file a claim for DIC unless the child is included on the surviving spouse's DIC award. VA will consider a child included on the surviving spouse's DIC award to have filed a DIC claim on his or her 18th birthday. See § 5.696.

(2) Discontinuance of a surviving spouse's right to DIC or to death pension. Except as otherwise provided in paragraph (c) of this section, if VA discontinues an award of DIC or death pension to a surviving spouse, a child may file a claim in his or her own right. If VA discontinues an award to a surviving spouse because he or she

remarries or dies, VA will consider any child included on the surviving spouse's award to have filed a claim for such benefit in his or her own right on the date VA discontinued the award to the surviving spouse.

(3) If a surviving spouse is not entitled to DIC or death pension. If VA denies a surviving spouse's claim for DIC or death pension, VA will consider the claim to be a claim for a child in the surviving spouse's custody, if the child was named as a dependent in the surviving spouse's application. If VA grants death benefits to the child, the award will be effective as though the child had filed the surviving spouse's denied claim. See §§ 5.431 and 5.538.

(Authority: 38 U.S.C. 501(a), 5110(e))

§ 5.53 Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.

VA will consider any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program to be a claim for benefits under 38 U.S.C. 1151 and § 5.350.

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

CROSS REFERENCE: §§ 5.350–5.353.

§ 5.54 Informal claims.

(a) Definition. Informal claim means any written communication VA receives that seeks an identified benefit and that is not on an application.

(b) Who may file an informal claim. An informal claim may be filed by:

(1) The claimant;

(2) The claimant's accredited or authorized representative, if appointed before VA received the informal claim (see §§ 14.630 and 14.631 of this chapter for criteria for authorization of representatives);

(3) A Member of Congress; or

(4) A person acting as next friend of the claimant if the claimant does not have the capacity to manage his or her affairs.

(c) Effect of filing informal claim—(1) No application filed previously. If the claimant has not previously filed an application for the benefit sought, VA will furnish an appropriate application to a person who files an informal claim. If the claimant files the completed application no later than 1 year after VA provided it, VA will treat it as if filed on the date VA received the informal claim. VA will take no action on the informal claim until the claimant files the completed application. If VA does not require an application for the benefit sought, VA may accept the informal claim as sufficient without regard to the procedures in this paragraph (c). See, for example, § 5.53.

(2) Application filed previously—(i) Disability benefits. If a claimant previously filed an application for disability benefits that met the requirements of § 5.51, VA will accept an informal claim to increase or to reopen a claim for disability benefits without requiring another application, except as provided in § 5.56.

(ii) Death benefits. If a claimant previously filed an application for death benefits that met the requirements of § 5.52, VA will accept an informal claim to increase or to reopen a claim for death benefits without requiring any other application, except as provided in § 5.588.

(Authority: 38 U.S.C. 501(a), 5102(a))

§ 5.55 Claims based on new and material evidence.

(a) Reopening a claim. A claimant may reopen a claim if VA has made a final decision denying the claim. See § 5.1 for the definition of "final decision".

(b) New and material evidence. To reopen a claim, the claimant must present or VA must secure new and material evidence. If VA receives a claim to reopen, it will determine whether evidence presented or secured to reopen the claim is new and material.

(c) Merits of a claim. If the claimant has presented or VA has secured new and material evidence, VA will reopen and decide the claim on its merits.

(d) Definitions. New and material evidence meets the following criteria:

(1) New evidence is:

(i) Evidence the claimant presented or VA secured since VA last made a final decision denying the claim the claimant seeks to reopen; and

(ii) Not cumulative or redundant of evidence of record at that time.

(2) For purposes of paragraph (d)(1)(i) of this section, evidence that was submitted with, but not considered by, the Board of Veterans' Appeals (the Board) under the circumstances described in § 20.1304(b)(1) of this chapter will be treated as evidence received after VA last made a final decision on the claim.

(3) Material evidence is evidence that, by itself or when considered with evidence of record when VA made the final decision,

(i) Relates to an unestablished fact necessary to substantiate the claim; and

(ii) Raises a reasonable possibility of substantiating the claim.

(e) Effective date. Except as otherwise provided in this chapter, if VA reopens a claim based on new and material evidence and grants the benefit sought, the award is effective on the date entitlement arose or the date that VA received the claim to reopen, whichever is later.

(Authority: 38 U.S.C. 501(a), 5103A(f), 5108, 5110(a))

CROSS REFERENCE: § 20.1304(b)(1)(i) of this chapter for the rule on effective date assigned when evidence is submitted to the Board during a pending appeal.

§ 5.56 Report of examination, treatment, or hospitalization as a claim.

(a) Scope. This section describes situations in which VA will accept certain medical evidence as a claim for benefits that meets the requirement that a claimant file a claim.

(b) Claims excluded. VA's receipt of a report of examination, treatment, or hospitalization is a claim under this section only under the circumstances described in paragraph (c) of this section. VA will not accept a report of examination, treatment, or hospitalization as a claim for service connection.

(c) Claims included. For purposes of this section, VA's receipt of evidence as described in paragraph (d) of this section is a claim under any of the following circumstances:

(1) Veteran previously granted service connection. If VA previously granted service connection in a final decision, even if a 0 percent rating was assigned, VA's receipt of evidence will be considered a claim for increased compensation if the evidence relates to the service-connected condition(s).

(2) VA previously granted pension. If VA previously granted a claim for pension, VA's receipt of evidence will be considered a claim for increased pension.

(3) VA previously granted a claim for service connection but the veteran elected retired pay, or VA denied a claim for pension because the veteran was receiving retired pay. If VA previously granted service connection but the veteran elected retired pay, or

VA previously denied a claim for pension because of the veteran's receipt of retired pay, VA's receipt of evidence will be considered a claim for pension or compensation.

(4) VA previously denied a claim for pension because the veteran was not permanently and totally disabled. If VA previously denied a claim for pension in a final decision because the veteran was not permanently and totally disabled, VA's receipt of evidence will be considered a claim for pension.

(d) Evidence—(1) Report of examination, treatment, or hospitalization at a VA or uniformed services facility, or at any other facility at VA expense.

(i) General rule. VA will consider an examination, treatment, or hospitalization report at a VA or uniformed services medical facility, or at any other medical facility where the veteran was maintained at VA expense, to be a claim under the circumstances described in paragraph (c) of this section.

(ii) Date of claim. The date of receipt of a claim under paragraph (c) of this section is:

(A) The date of a veteran's examination, treatment, or hospitalization at a VA or uniformed services medical facility;

(B) The date of pre-authorized admission to a non-VA hospital at VA expense;

(C) The date of a uniformed service examination that is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list; or

(D) The date VA received notice of admission to a non-VA hospital, if VA authorized the admission at VA expense after the date of admission.

(2) Evidence from a private physician or lay person—(i) General rule. VA will consider evidence from a private physician or lay person to be a claim under paragraph (c) of this section if the evidence is within the competence of the physician or lay person and it shows a reasonable probability of entitlement to benefits.

(ii) Date of claim. The date VA receives the evidence from a private physician or lay person will be the date of the claim.

(3) Evidence from State and other institutions—(i) General rule. VA will consider examination reports, clinical records, or transcripts of records from State, county, municipal, or recognized private institutions, or other Government hospitals to be a claim for benefits under paragraph (c) of this section, except those described in paragraph (d)(1) of this section. An appropriate official of the institution must authenticate these records. VA will grant benefits if the records are adequate for rating purposes and demonstrate entitlement to an increased rating, to pension, or to special monthly pension; otherwise findings must be verified by VA examination. The VA Under Secretary for Health or his or her physician designee must certify reports received from private institutions not listed by the American Hospital Association.

(ii) Date of claim. If filed by or for the veteran, the date VA receives such evidence will be the date of the claim.

(e) Liberalizing law or VA issue. The provisions of § 5.152 apply to claims accepted under this section in the same manner as they apply to other formal and informal claims.

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

§ 5.57 Claims definitions.

The following definitions apply to claims for disability benefits, death benefits, and monetary allowance under 38 U.S.C. chapter 18.

(a) Informal claim. See § 5.54.

(b) Original claim means the first claim VA receives from a person for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18. See §§ 5.51, 5.52, 5.589, and 5.590.

(c) Pending claim means a claim in which VA has not made a final decision. See § 5.1 for the definition of "final decision."

(d) Claim for increase means any claim for an increase in the rate of a benefit VA is paying under a current award, or for resumption of payments previously discontinued.

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

§§ 5.58–5.79 [Reserved]

RIGHTS OF CLAIMANTS AND BENEFICIARIES

§ 5.80 Right to representation.

Subject to the provisions of §§ 14.626 through 14.637 of this chapter, a claimant or beneficiary is entitled to the representation of his or her choice at every stage in the claims process. When VA initially contacts a claimant or beneficiary by mail, VA will also include written notice of his or her right to representation.

(Authority: 38 U.S.C. 501(a), 5901-5904)

CROSS REFERENCE: § 19.25 of this chapter, "Notification by agency of original jurisdiction of right to appeal," which includes notification of the right to representation.

§ 5.81 Submission of information, evidence, or argument.

VA will include in the evidence of record any document, testimony, argument, or other information in any form that a claimant provides VA in support of a claim or of an issue raised in the claim.

(Authority: 38 U.S.C. 501(a), 5107(b))

§ 5.82 Right to a hearing.

(a) General. This section pertains only to hearings in matters under the jurisdiction of a VA agency of original jurisdiction. See §§ 20.700 and 20.1304 of this chapter for the provisions concerning a claimant's or beneficiary's right to a hearing with

the Board of Veterans' Appeals. See § 14.633 of this chapter for the provisions concerning an accredited representative's right to request a hearing.

(1) The one-hearing rule. Except as provided in paragraph (f) of this section, upon request, a claimant or beneficiary is entitled to one hearing before the agency of original jurisdiction at any time on any issue or issues involved in a pending matter. When VA sends written notice of a decision to a claimant or of a proposed reduction, discontinuance, or other adverse action under § 5.83 to a beneficiary, VA will also include notice of the right to a hearing. Except as provided in paragraph (a)(2) of this section, a claimant or beneficiary who had a hearing before the Board of Veterans' Appeals (Board) reviewed the matter is not entitled to an additional hearing after that matter is remanded by the Board to the agency of original jurisdiction.

(2) Exception to the one-hearing rule. A claimant or beneficiary will be provided one additional hearing at the agency of original jurisdiction on any issue involved in a matter when the claimant or beneficiary asserts all of the following:

(i) He or she has discovered a new witness or new evidence to substantiate the claim;

(ii) He or she can present that witness or evidence only at an oral hearing; and

(iii) The witness or evidence could not have been presented at the original hearing.

(b) Purpose of hearings. The purpose of a hearing under this section is to provide the claimant or beneficiary with an opportunity to introduce into the record, in

person, any available evidence or arguments that he or she considers important to the matter.

(c) Where VA will conduct hearings. VA will conduct the hearing in the VA office that has jurisdiction over the matter or in the VA office with adjudicative functions nearest the claimant's or beneficiary's residence. Subject to available resources and solely at the option of VA, VA may hold the hearing at any other VA facility or federal building with suitable facilities.

(d) VA responsibilities in conjunction with hearings. (1) VA will provide advance written notice to a claimant or beneficiary of the time and place of the hearing at least 10 days before the scheduled hearing date. The claimant or beneficiary may waive the 10-day advance notice requirement. If the hearing arises in the context of a proposed reduction, discontinuance, other adverse action, or in an appeal, a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing. The employee or employees will establish a record of the hearing and will issue a decision after the hearing.

(2) The VA employee or employees conducting the hearing will explain fully the issues and suggest the submission of evidence the claimant or beneficiary may have overlooked that would tend to prove the matter. To ensure clarity and completeness of the hearing record, questions directed to the claimant or beneficiary, or to witnesses, will be framed to explore fully the basis for entitlement rather than with intent to refute

evidence or to discredit testimony. The employee, or employees, conducting the hearing will ensure that all testimony is given under oath or affirmation.

(3) If a hearing is conducted, VA will make a decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record.

(e) Claimant's and beneficiary's rights and responsibilities in conjunction with hearings. (1) The claimant or beneficiary is entitled to have witnesses testify. The claimant or beneficiary, and witnesses, must appear at the hearing, in person or by videoconferencing. Normally, VA will not schedule a hearing for the sole purpose of receiving argument from a representative, but VA may grant a request for such a hearing if good cause is shown.

(2) All expenses incurred by the claimant or beneficiary in conjunction with the hearing are the responsibility of the claimant or beneficiary.

(3) If a claimant or beneficiary is unable to attend a scheduled hearing, he or she may contact VA in advance to reschedule the hearing for a date and time which is acceptable to both parties.

(4) If a claimant or beneficiary fails to report for a scheduled hearing

(i) Without good cause, VA will decide the claim based on the evidence of record without a hearing.

(ii) With good cause, VA will reschedule the hearing after the claimant or beneficiary informs VA that the cause of the failure to report has resolved and requests that VA reschedule the hearing. Examples of good cause include, but are not limited to,

illness or hospitalization of the claimant or beneficiary, or death of an immediate family member.

(f) Additional requirements for hearings before proposed adverse actions. Except as otherwise provided in § 5.83(c) , VA will provide written notice of the right to a hearing before VA reduces, discontinues, or otherwise adversely affects benefits. VA will conduct a hearing before the adverse action only if VA receives a request for one no later than 30 days after the date of the notice of the proposed action.

(1) If the beneficiary does not timely request a hearing, or fails without good cause to report for a scheduled hearing, VA will make the decision on the proposed action based on the evidence of record.

(2) If VA receives a request for a hearing no later than 30 days after the date of the notice of the proposed action, VA will send the beneficiary written notice of the time and place for the hearing.

(3) VA will send the written notice of the time and place of the hearing at least 10 days before the scheduled hearing date. The beneficiary may waive the 10-day advance notice requirement.

(4) If a beneficiary timely requests a hearing, VA will not make the decision reducing, discontinuing, or otherwise adversely affecting benefits before the scheduled date of the hearing.

(5) If a hearing is conducted, VA will make the decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record.

CROSS REFERENCE: See §§ 5.162, 5.163, 5.175, 5.83(a), and 5.177 for the procedures VA follows when revising decisions and the effective date of these decisions.

(Authority: 38 U.S.C. 501(a)(1))

§ 5.83 Right to notice of decisions and proposed adverse actions.

(a) VA will send an advance notice of a proposed adverse action. (1) Except as provided in paragraph (c) of this section, VA will send written notice of a proposed adverse action to a beneficiary at least 60 days before it reduces or discontinues benefits, severs service connection, or otherwise adversely affects the beneficiary's receipt of benefits. The notice will include:

(i) Detailed reasons for the proposed adverse action and a statement of the material facts;

(ii) The right to a hearing on the proposed adverse action as provided in § 5.82(f); and

(iii) Notification that the beneficiary has 60 days to submit evidence or argument to show why VA should not take the proposed adverse action.

(2) If VA receives no additional evidence or argument within the 60-day period, or the evidence or argument received does not demonstrate that the proposed adverse action should not be taken, then VA will take the action and provide notice to the beneficiary in accordance with paragraph (b) of this section.

(b) VA will send a notice of a decision. VA will send to a claimant or beneficiary written notice of any decision that affects the payment of benefits or the granting of relief to that claimant or beneficiary. The notice will explain:

(1) If a claim is not fully granted, the reason for the decision and a summary of the evidence considered;

(2) The effective date of the decision;

(3) The right to a hearing on any issue involved in the claim, in accordance with § 5.82;

(4) The right to representation in accordance with § 5.80; and

(5) The right to appeal, including how and when to exercise this right to appeal. (Appellate procedures are found in part 20 of this chapter.)

CROSS REFERENCE: See §§ 5.162, 5.163, 5.175, 5.83(a), and 5.177 for procedures applicable to the type of action VA is taking.

(c) When VA will send a contemporaneous notice of reduction, discontinuance, or other adverse action. VA will send a written notice to a beneficiary at the same time it reduces, discontinues, or otherwise takes an adverse action under any of the circumstances described in paragraphs (c)(1) through (6) of this section.

(1)(i) The adverse action results solely from information or statements, provided orally or in writing to VA by the beneficiary or the fiduciary, as to income, net worth, dependency, or marital status;

(ii) The information or statements are factual and unambiguous; and

(iii) The beneficiary or fiduciary has knowledge or notice that such information or statements may be used to calculate benefit amounts. See § 5.130 for procedures governing the submission by a beneficiary or by his or her fiduciary of oral or written information or statements.

(2) The adverse action results from the beneficiary's or fiduciary's failure to return an eligibility verification report as required by § 5.708.

(3) VA receives credible evidence indicating that a beneficiary has died. However, VA is not required to send a notice of discontinuance of benefits (contemporaneous or otherwise) if VA receives:

(i) A death certificate;

(ii) A terminal hospital report verifying the death of a beneficiary;

(iii) A claim for VA burial benefits;

(iv) An “Application for United States Flag for Burial Purposes”; or

(v) A “Record of Interment” from the National Cemetery Administration.

(4) The adverse action results from a beneficiary's written and signed statement renouncing benefits (see § 5.683 on renouncement).

(5) The adverse action results from a veteran's written and signed statement that he or she has returned to active military service. The statement must include each of the following:

(i) The branch of service;

(ii) The date of reentry into service;

(iii) The veteran's acknowledgement that receipt of active military service pay precludes receipt for the same period of VA disability compensation or pension. See § 5.746 regarding active service pay.

(6) The adverse action results from a garnishment order issued under 42 U.S.C. 659(a), allowing the U.S. to consent to garnishment or withholding of pay for members of the Armed Forces and, in certain circumstances, disability compensation, to enforce child support and alimony obligations. See 42 U.S.C. 659(h)(1)(A)(ii)(V) for the limited circumstance of garnishing certain disability pay.

(Authority: 38 U.S.C. 501(a), 5104)

§ 5.84 Restoration of benefits following adverse action.

(a) (1) If VA reduces or discontinues benefits, or takes other action adverse to a beneficiary, based upon written information or an oral statement provided by the beneficiary or fiduciary, VA will retroactively restore such benefits if the beneficiary or fiduciary asserts, no later than 30 days after the date of the VA notice of adverse action, either of the following:

(i) The written information or oral statement is inaccurate.

(ii) The written information or oral statement was not provided by the beneficiary or his or her fiduciary.

(2) This paragraph (a) does not limit the right of a beneficiary to have benefits retroactively restored based on evidence submitted within the 1-year appeal period under § 5.153.

(b) Restoration of benefits under this section does not preclude VA from later taking action that adversely affects the beneficiary's receipt of benefits based on the written information or oral statements referred to in paragraph (a) of this section.

(Authority: 38 U.S.C. 501(a), 5103(b)(3), 5104)

§§ 5.85–5.89 [Reserved]

DUTIES OF VA

§ 5.90 VA assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Substantially complete application means an application containing the following:

(i) The claimant's name; his or her relationship to the veteran, if applicable;

(ii) Sufficient service information for VA to verify the claimed service, if applicable;

(iii) The benefit claimed and any medical condition(s) on which it is based;

(iv) The claimant's signature; and

(v) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(2) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to a disability or disabilities.

(3) Information means non-evidentiary facts, including, but not limited to the following:

(i) The claimant's Social Security number or address;

(ii) The name and military unit of a person who served with the veteran; or

(iii) The name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to send notice to claimants of necessary information or evidence. (1)(i) When VA receives an application for benefits, it will send the claimant written notice of any information and medical or lay evidence that is necessary to substantiate the claim. In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The claimant must provide the information and evidence requested by VA no later than 1 year after the date of the notice. If VA has not received the information and evidence by 30 days after the notice, then VA may decide the claim prior to the expiration of the 1-year period. VA will decide the claim based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, and the claimant subsequently

provides the information and evidence no later than 1 year after the date of the notice, then VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(ii) The provisions of this paragraph (b) apply to all applications for benefits under part 5 of this chapter unless VA awards the claimant the maximum benefit without providing notice of any information and evidence that is necessary to substantiate the claim. (For purposes of this section, the term “maximum benefit” means the highest evaluation assignable in
accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with 38 U.S.C. 5110.) 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 after the date of the request therefor. However, any evidence to enlarge the proofs and evidence originally submitted is not considered substantiating evidence.

(2) If VA receives an incomplete application for benefits, it will send written notice to the claimant of the information necessary to complete the application and will defer assistance to substantiate the claim until the claimant submits this information.

(3) If the information VA requests under paragraph (b)(1) or (2) of this section, or the evidence requested under paragraph (b)(1) of this section, is not received by 1 year after the date of the notice, pension, compensation, or dependency and indemnity

compensation may not be paid by reason of that application. If a claimant submits information or evidence concerning his or her mailing address, that is not considered information or evidence under this paragraph (b).

(Authority: 38 U.S.C. 5102(b), 5103(a), 5103A(3))

(4) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist a claimant in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1) through (3) of this section to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private

medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal

department or agency. These records include but are not limited to military records, including service treatment records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in disability compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service treatment records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §§ 5.261 through 5.268 manifesting

during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (c)(4)(i)(C) of this section could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) This paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to inform claimant of inability to obtain records. (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will send notice to the claimant of the records and request that the claimant

provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) Notice. For purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) Secretary's Discretion. The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

§ 5.91 Medical evidence for disability claims.

(a) Medical evidence rendering VA examination unnecessary. VA may adjudicate a claim without providing a VA examination or period of hospital observation

if any private or government examination or hospital report of record is adequate to adjudicate the claim.

(b) Rating injuries and conditions obviously incurred in service. VA may assign a rating for combat injuries or other conditions that obviously were incurred in service as soon as sufficient evidence to rate the severity of the condition is available, even if VA has not yet received the claimant's enlistment examination and other service records.

(Authority: 38 U.S.C. 1154, 5103A, 5125)

§ 5.92 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 will 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 will 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 representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests will be submitted through the Veterans Service Center

Manager or the Pension Management Center Manager of the office having jurisdiction over the claim, and those requests which in the judgment of that official merit consideration will be referred to the Compensation Service or Pension and Fiduciary Service for approval.

(c) Approval. Approval will be granted only upon a determination by the Compensation Service that the issue under consideration poses a medical problem of such 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 Service will 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 Service will send written notice to the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and will 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 will be subject to the special procedures set forth in § 1.577 of this chapter.

(Authority: 5 U.S.C. 552a(f)(3); 38 U.S.C. 5109, 5701(b)(1))

§ 5.93 Service records which are lost, destroyed, or otherwise unavailable.

(a) Records in the custody of the Department of Defense. When records that are potentially relevant to a claim for benefits and that were in the custody of the Department of Defense have been lost or destroyed, or otherwise have become unavailable, VA will not deny the claim without attempting to obtain potentially relevant evidence from alternative sources. (Examples of evidence from alternative sources are listed in paragraph (c) of this section.)

(b) Destruction due to fire at the National Personnel Records Center. On July 12, 1973, there was a fire at the National Archives and Records Administration's National Personnel Records Center (NPRC). When the NPRC reports that it does not have the claimant's records because they were destroyed by this fire, VA will not deny the claim without attempting to obtain potentially relevant evidence from alternative sources. (Examples of evidence from alternative sources are listed in paragraph (c) of this section). The following are the two main groups of records destroyed by the NPRC fire:

(1) Army. Records for certain Army veterans who served between November 1, 1912, and January 1, 1960. Records of Army retirees who were alive on July 12, 1973, were not destroyed by the fire because they were stored at a different location.

(2) Air Force. Records for certain Air Force veterans with surnames “Hubbard” through Z who were discharged between September 25, 1947, and January 1, 1964, and had no retired or Reserve status.

(c) Evidence from alternative sources. Depending on the facts of the case, sources of potentially relevant evidence from alternative sources for records described in paragraphs (a) or (b) of this section include the following:

(1) A claimant's personal copies of discharge papers, service treatment records, or other evidence of military service;

(2) State Adjutant Generals' offices or State historical commissions;

(3) The Office of Personnel Management (if the veteran was employed by a Federal or State agency), a private employer, or the Railroad Retirement Board (if the veteran was employed by a railroad);

(4) The Social Security Administration;

(5) VA or military files or records relating to an earlier claim filed with VA;

(6) Service medical personnel or people who knew the veteran during his or her service;

(7) State or local accident and police reports from the time and place the veteran served;

(8) Employment physical examinations or insurance examinations;

(9) Hospitals, clinics, or private physicians who treated a veteran, especially soon after separation, or pharmacies that filled prescriptions;

(10) Letters written during service or photographs taken during service.

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

§§ 5.94 – 5.98 [Reserved]

§ 5.99 Extensions of certain time limits.

(a) Requests for extension. A time limit specified in this part for providing information or evidence necessary to substantiate a claim or for challenging a decision by an agency of original jurisdiction may be extended for good cause.

(b) Form and filing of request. The request for extension of time must be in writing and state why more time is needed. It must be filed with the VA office that made the decision or required the information or evidence, unless VA has sent notice to the claimant that his or her VA file has been transferred to another VA office.

(c) Late Requests. If the claimant requests an extension after the expiration of the applicable time limit, the claimant must complete the action required in paragraph (a) of this section prior to or concurrently with filing the request for the extension. The request for the extension must state why the required action could not have been taken during the applicable time limit and could not have been taken sooner than it was. VA will grant the extension if good cause is shown, but no extension will be granted if VA has made a decision on the claim to which the required information or evidence relates and the time to appeal that decision has expired. See §20.304 of this chapter.

(d) Appeals of denial of a request for extension. Denial of an extension under this section is a separately appealable issue.

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

§ 5.100 Time limits for claimant or beneficiary responses.

(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 Federal 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 will be the date of mailing of notice to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notice will be considered the date of mailing for purposes of computing time limits. Regarding appeals, see §§ 20.302 and 20.305 of this chapter.

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

§ 5.101 Requirement to provide Social Security numbers.

(a) General requirement to provide Social Security number or Taxpayer Identifcation Number. If requested to do so by VA, each claimant for, or beneficiary of, disability compensation, pension, dependency and indemnity compensation, or a monetary benefit under 38 U.S.C. chapter 18 must provide to VA his or her Social Security number, or Taxpayer Identifcaition Number (TIN) if that person is not an individual,as well as the Social Security number of any dependent or other person to or for whom benefits are sought or received. Anyone who signs a form on behalf of such an individual must also provide his or her Social Security number or TIN if requested to do so by VA.

(b) Individuals receiving VA benefits. If, within 60 days after VA's request, a beneficiary fails to provide a Social Security number or to show that no Social Security number or TIN was assigned, then VA will take the following action:

(1) If the beneficiary fails to provide his or her own Social Security number or TIN, then VA will discontinue benefits.

(2) If the beneficiary fails to provide the Social Security number or TIN of any dependent to or for whom benefits are being paid, then VA will reduce the benefits payable by the amount payable to or for such dependent. However, VA may still consider that dependent's income for purposes of determining entitlement to income-based benefits.

(c) Effective date of reduction or discontinuance. If VA has not received the requested Social Security number or TIN 60 days after VA's request, then VA will

discontinue or reduce benefits under paragraph (b) of this section effective the first day of the month after the 60-day period expires.

(d) Effective date of resumed payments. If a beneficiary provides VA with the requested Social Security number or TIN, VA will resume payment of benefits at the prior rate, effective on the date VA received the Social Security number, provided that payment of benefits at that rate is otherwise in order.

(e) Claimant's application for VA benefits. If, within 30 days after VA's request, the claimant fails to provide the requested Social Security number or TIN, or to show that no Social Security number or TIN was assigned, then VA will deny the claim. If a claimant fails to provide the Social Security number or TIN of a dependent, then VA will deny benefits for the dependent. If VA denies the claim or denies benefits for the dependent, and the claimant subsequently provides the Social Security number or TIN no later than 1 year after the notice of that decision, then VA must readjudicate the claim.

(f) When a Social Security number or TIN is not required. A claimant or beneficiary is not required to provide a Social Security number or TIN for any person to whom a Social Security number or TIN has not been assigned.

(Authority: 38 U.S.C. 501(a), 1832, 5101(c))

§ 5.102 Reexamination requirements.

(a) General. VA may reexamine a beneficiary, or require a period or periods of hospital observation, at any time to ensure that the beneficiary's disability rating is accurate. For example, VA may reexamine a beneficiary if evidence indicates that the disability for which VA is making payments may no longer exist or may have improved to such a degree that a reduced rating might be appropriate; or if reexamination is otherwise necessary to ensure that the disability is accurately evaluated. Paragraphs (c) and (d) of this section provide general guidelines for scheduling reexaminations, but do not limit VA's authority to schedule reexaminations or periods of hospital observation at any time in order to ensure that a disability is accurately rated.

(b) Beneficiaries are required to report for scheduled reexaminations. A beneficiary must report for a VA-scheduled reexamination. If he or she does not report, VA will take the steps described in § 5.103.

(c) Scheduling reexaminations in disability compensation cases. The following rules apply to disability compensation cases:

(1) General rule. As a general rule, if periodic future reexaminations are warranted, VA may schedule such reexaminations to occur between 2 and 5 years after the date on which VA last examined the beneficiary, unless some other law or regulation specifies another time period.

(2) When VA will not schedule periodic reexaminations. VA will not schedule periodic future reexaminations under the following circumstances:

(i) The disability is static;

(ii) Medical examinations or hospital reports show that the symptoms and findings of the disability have persisted without significant improvement for at least 5 years;

(iii) The beneficiary has reached age 55, except in unusual circumstances;

(iv) The disability in question is rated at a prescribed mandatory minimum level under the Schedule for Rating Disabilities in part 4 of this chapter; or

(v) The combined disability rating would not decrease even if a reexamination for the specific disability at issue would result in a decreased rating for that disability; however, if a reexamination potentially would reduce an award of special monthly compensation, reexamination may be warranted even if the combined disability rating would not be reduced. See § 4.25 of this chapter for information on “combined ratings” and how they are calculated.

(3) Discharge from service with unstabilized disability. If a person is discharged from military service with a disability that has not yet become stable or with a disability caused by a wound or injury that has not yet completely healed, VA may, pursuant to § 4.28 of this chapter, temporarily assign a prestabilization disability rating of either 100 percent or 50 percent to the disability. If VA assigns a prestabilization rating under § 4.28 of this chapter, VA will schedule a reexamination to occur 6 to 12 months after the date the person separates from service, to determine the appropriate schedular rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(d) Pension cases. The following rules apply to pension cases:

(1) If the beneficiary has reached age 55, VA will schedule a reexamination only in unusual circumstances.

(2) VA generally will not schedule a reexamination if it is obvious that the disability is unlikely to improve over the long term or the medical history has confirmed the presence of a permanent and total nonservice-connected disability. In other cases, VA will reexamine only in unusual circumstances.

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

§ 5.103 Failure to report for VA examination or reexamination.

(a) General. VA will schedule a VA examination when needed to establish entitlement to a benefit or to an increased disability rating. VA will schedule a VA reexamination when needed to confirm continued entitlement to a benefit or continued entitlement to a particular disability rating. If a claimant or beneficiary, with good cause, fails to report for a VA examination or reexamination, VA will reschedule the examination or reexamination. Examples of good cause are listed in paragraph (f) of this section.

(b) Failure without good cause to report for a scheduled examination: claimants. If a claimant, without good cause, fails to report for a VA examination, VA will decide the claim as follows:

(1) For an original disability compensation claim, VA will make a decision based on the evidence of record.

(2) For any other original claim, reopened claim, or a claim for increase, VA will deny the claim.

(c) Failure without good cause to report for a scheduled reexamination: beneficiary. (1) Continuing entitlement to a benefit. If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to the benefit cannot be confirmed without a VA reexamination, VA will propose to discontinue the benefit.

(2) Continuing entitlement to a particular rating. If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to a particular disability rating for one or more of the beneficiary's disabilities cannot be confirmed without a VA reexamination, VA will propose to reduce the rating for the disability or disabilities at issue to one of the following, as applicable:

(i) The highest disability rating assigned to that disability that is protected under § 5.170(a).

(ii) The rating specified as the minimum rating permitted for that disability under the Schedule for Rating Disabilities in part 4 of this chapter.

(iii) Zero percent, unless the rating is protected under the provisions of § 5.170 or the Schedule for Rating Disabilities in part 4 of this chapter prescribes a minimum rating for the disability or disabilities.

CROSS REFERENCE: See § 5.170, “Calculation of 5-year, 10-year, and 20-year protection periods”.

(d) Advance notice of proposed discontinuance or reduction. (1) Notice. If VA proposes to discontinue or reduce payment under paragraph (b) or (c) of this section, VA will send written notice to the beneficiary of its intended action. The notice must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary’s procedural rights as listed in § 5.83(a)(1) through (4).

(2) Time period during which the beneficiary must respond. VA must receive either notification that the beneficiary will report for reexamination or evidence showing that VA should not discontinue or reduce payments no later than 60 days after the date of VA’s notice. If VA receives notification that the beneficiary will report for reexamination, it will schedule a reexamination. If VA receives evidence showing that VA should not discontinue or reduce payments, it will not do so.

(3) No response or inadequate response. If VA does not receive the notification or evidence required by paragraph (d)(2) of this section, VA will take the action described in the notice referred to in paragraph (d)(1) of this section. The action will be effective on the date identified in the notice or the first day of the month after the month for which VA last paid benefits to the beneficiary, whichever is later.

(4) Hearing. The beneficiary may request a hearing to challenge VA's proposed adverse action as provided in § 5.82(f). If, 30 days after the notice, VA has not received the beneficiary's request for a hearing, then VA will discontinue or reduce payments effective on the date the notice specified or the first day of the month after the month for

which VA last paid benefits, whichever is later, unless evidence is presented that warrants a different determination.

(5) Rescheduled reexamination. The beneficiary may ask VA to schedule another date for reexamination, either instead of or in addition to asking for a hearing. If VA receives the request to reschedule before the payments are discontinued or reduced, VA will halt its action to discontinue or reduce payments and will schedule a new reexamination date. VA will send written notice to the beneficiary that if he or she fails to report for the rescheduled reexamination, then VA will immediately discontinue or reduce the payments as of the first day of the month after the month for which VA last paid benefits.

(e) Resumption of payments. If VA discontinues or reduces payments for failure to report for a reexamination, VA will issue a new decision after the beneficiary reports for a VA reexamination. VA will send written notice to the beneficiary of any period of time for which it could not pay benefits at the previous level and the reason(s) why, and identify the period of time for which it has resumed paying such benefits.

(f) Examples of good cause. Examples of good cause for failure to report for a VA examination or reexamination include a claimant's or beneficiary's illness or hospitalization, and the death of an immediate family member. VA will determine on a case-by-case basis whether good cause is established.

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

§ 5.104 Certifying continuing eligibility to receive benefits.

Except as otherwise provided, the following rules govern the certification of continuing eligibility.

(a) Responsibility to certify continuing eligibility upon request. Each beneficiary, if requested to do so by VA, must certify whether the factual basis that established entitlement to benefits still exists. The requested certification may concern marital status, income, number of dependents, or any other fact affecting entitlement to a benefit or the amount of benefits payable. VA must receive the beneficiary's certification, including any requested information, no later than 60 days after the date of VA's request.

(b) If VA does not receive the certification in 60 days. If VA has not received the requested certification 60 days after the date of VA's request, VA will assume that the fact(s) about which the certification was requested ceased to exist as of the end of the month in which VA received the last evidence of record establishing or confirming the fact(s).

(c) Additional 60 days provided. If VA has not received the requested certification 60 days after the date of VA's request, VA will send written notice to the beneficiary that VA proposes to reduce or discontinue the benefits and will allow the beneficiary 60 days in which to provide VA with the required certification. The notice

must include the effective date of the proposed reduction or discontinuance. If the beneficiary does not provide the required certification after the additional 60 days, VA will reduce or discontinue the benefit, according to the appropriate effective date provisions in effect on the date the eligibility factor(s) is considered to have ceased to exist.

(d) VA action when the evidence is received. When the certification requested is provided, VA will adjust the benefits, if necessary, according to the information provided and the other evidence of record.

(Authority: 38 U.S.C. 501(a), 1315, 1506)

§§ 5.105 – 5.129 [Reserved]

General Evidence Requirements

§ 5.130 Submission of statements, evidence, or information affecting entitlement to benefits.

(a) Claimants—(1) VA policy concerning submission of written statements, evidence, or information by claimants. It is VA's general policy to allow submission of statements, evidence, or information by regular mail, hand delivery, facsimile (fax) machine, or other electronic means that the Secretary prescribes, unless a VA regulation, application, or directive expressly requires a different method of submission

(for example, where an application directs a claimant to file certain documents by regular mail or hand delivery).

(2) Content of submissions. Paragraph (a)(1) of this section concerns the method by which written statements, evidence, or information is filed with VA. Requirements regarding the content of the submission must still be met.

(3) VA action following submission of written statements, evidence, or information. Except as otherwise provided, after a claimant or his or her fiduciary or authorized representative provides VA with a written statement, evidence, or information regarding entitlement to benefits, VA will take appropriate action in response to the statement, evidence, or information.

(b) Beneficiaries—(1) VA policy concerning submission of statements, evidence, or information by a beneficiary. It is VA's general policy to allow submission of statements, evidence, or information by regular mail, hand delivery, e-mail, facsimile (fax) machine, oral statements, or other electronic means that the Secretary prescribes, unless a VA regulation, application, or directive expressly requires a different method of submission. This policy only applies to submissions regarding entitlement to benefits already awarded.

(2) Content of submissions. Paragraph (b)(1) of this section concerns the method by which written statements, evidence, or information is filed with VA. Requirements regarding the content of the submission must still be met.

(3) VA action following submission of statements, evidence, or information. Except as otherwise provided, after a beneficiary or his or her fiduciary or authorized

representative provides VA with a statement, evidence, or information regarding entitlement to benefits, VA will take appropriate action in response to the statement, evidence, or information.

(4) Notice and documentation of oral statements. Except as provided in paragraph (c) of this section, VA will not take action based on oral statements unless, during the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee receiving the information does the following:

(i) Identifies himself or herself as a VA employee who is authorized to receive the statement, which means the VA employee must be authorized to take actions under § 2.3 of this chapter or § 5.5;

(ii) Verifies the identity of the provider as the beneficiary or his or her fiduciary or authorized representative by obtaining specific information about the beneficiary that is contained in the beneficiary's VA records, such as Social Security number, date of birth, branch of military service, dates of military service, or other information;

(iii) Informs the provider that VA will use the statement to determine entitlement and to calculate benefit amounts; and

(iv) During or following the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee documents in the beneficiary’s VA record all of the following elements:

(A) The specific statement provided;

(B) The date such statement was provided;

(C) The identity of the provider;

(D) The steps taken to verify the identity of the provider as the beneficiary or his

or her fiduciary or authorized representative; and

(E) The employee's statement that he or she informed the provider that VA will use the statement to determine entitlement and to calculate benefit amounts.

(c) Exceptions to paragraph (b)(4) notice and documentation requirements. Paragraph (b)(4) of this section does not apply to oral statements:

(1) Made at a VA hearing; or

(2) Recorded by VA personnel in reports of medical treatment or examination.

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

§ 5.131 Applications, claims, and exchange of evidence with Social Security Administration – death benefits.

(a) Dual-purpose Social Security Administration and VA applications. VA considers a claim for death benefits submitted to the Social Security Administration (SSA) on an application jointly prescribed by VA and the SSA to be a claim for dependency and indemnity compensation, death pension, and accrued benefits. VA will consider the claim to have been received by VA on the same date that the SSA received it.

(b) Evidence submitted to the Social Security Administration. VA considers evidence submitted to the SSA in conjunction with a claim under paragraph (a) of this section to have been received by VA on the same date that the SSA received it.

(c) Social Security Administration request for copies or certifications of evidence submitted to VA. At the SSA's request, VA will furnish copies or certifications of evidence that a claimant has filed with VA in support of a claim for VA death benefits, provided that the release of this evidence fully complies with all requirements in any applicable laws and regulations that protect the confidentiality of VA records.

(Authority: 38 U.S.C. 501(a), 5101(b)(1), 5105)

§ 5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.

(a) Claims and evidence submitted abroad. A claim, or a statement, information, or evidence in support of a claim, may be submitted to a Department of State representative in a foreign country. Any claim, statement, information, or evidence submitted in a foreign country will be considered received by VA on the same date that it was received by the Department of State representative in that foreign country. Diplomatic and consular officers of the Department of State are authorized to act as agents of VA.

(b) Authentication of foreign documents. Foreign documents listed in paragraph (c) of this section do not require authentication. All other foreign documents must be authenticated as specified in paragraph (d) of this section.

(1) Foreign documents means documents that are signed under oath or affirmation in the presence of an official in a foreign country. Examples of foreign

documents include affidavits, marriage certificates, and birth certificates that have been created, executed, or validated by a foreign government.

(2) Authentication means that an official listed in paragraph (d) of this section verifies that the foreign document, including each signature, stamp, and seal appearing on it, is genuine and has not been altered.

(c) Authentication of certain foreign documents not required. VA does not require authentication of the following types of foreign documents:

(1) Documents approved by the Deputy Minister of Veterans Affairs for the Department of Veterans Affairs, Ottawa, Canada;

(2) Documents bearing the signature and seal of an officer authorized to administer oaths for general purposes;

(3) Documents signed before a VA employee authorized to administer oaths under § 2.3 of this chapter;

(4) Affidavits prepared in the Republic of the Philippines that are certified by a VA representative who is located there and who has the authority to administer oaths; and

(5) Copies of public, church, or other religious-context records from any foreign country used to establish birth, adoption, marriage, annulment, divorce, or death, provided that the documents have the signature and seal of the custodian of these records and there is no contrary evidence of record that tends to cast doubt on the correctness of the documents.

(d) Authentication of foreign documents required. Foreign documents not listed in paragraph (c) of this section must be authenticated by:

(1) An officer of the Department of State authorized to authenticate documents; or

(2) The Consul of a friendly government whose signature and seal is verified by the Department of State.

(e) Photocopies of foreign documents. VA will accept photocopies of any of the foreign documents described in paragraphs (c) and (d) of this section if VA determines that the photocopies satisfy the requirements of § 5.181.

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

§ 5.133 Information VA may request from financial institutions.

(a) Names and addresses. If VA needs to verify a person's correct name or address, VA may request this information from a financial institution, such as a bank, savings and loan association, trust company, or credit union. In its request, VA must certify that the name or address is necessary in order to properly administer its benefit programs and that VA cannot locate the information by a reasonable search of its records.

(b) Financial information. VA may ask a financial institution to provide financial records of a current or former claimant or a current or former beneficiary if such

evidence is necessary to determine whether such person has failed to comply with a statute, regulation, rule, or order. VA must request the financial records through a subpoena. A "subpoena" is a legal document commanding a person or organization to provide specified evidence to the issuer of the subpoena. See § 2.2 of this chapter for information on VA's authority to issue subpoenas. Before the date VA serves a subpoena on a financial institution, VA must serve or mail a copy of the subpoena, a written explanation of its purpose, and the procedure for challenging the subpoena to the claimant or beneficiary. See 12 U.S.C. 3405.

(c) Limitations on use of information. Unless permitted under the Right to Financial Privacy Act, 12 U.S.C. 3401, et seq., VA may not:

(1) Use information obtained from a financial institution for any purpose other than the administration of benefits programs; or

(2) Share this information with any other person, group, or government entity.

(Authority: 12 U.S.C. 3401, 3405, 3412, 3413; 38 U.S.C. 501(a), 5319, 5711)

§ 5.134 VA acceptance of signature by mark or thumbprint.

VA will accept a signature by mark or thumbprint if it is:

(a) Witnessed by two people who sign their names and give their addresses;

(b) Witnessed by an accredited agent, attorney, or service organization representative;

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

(d) Certified by a VA employee who has been delegated authority by the Secretary under 38 CFR 2.3.

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

§ 5.135 Statements certified or under oath or affirmation.

(a) Oral testimony. All oral testimony presented at a hearing by a claimant, or by a witness on his or her behalf, will be under oath or affirmation. See § 5.82(d)(2).

(b) Documentary evidence or written assertion of fact. Any documentary evidence or written assertion of fact filed by the claimant or on his or her behalf for purpose of establishing a claim must be certified or under oath or affirmation. However, VA may decide that certification or oath or affirmation is not necessary to establish the reliability of a document and therefore not required. Documentary evidence includes, but is not limited to, records, examination reports, and transcripts that VA receives from State, county, or municipal governments, recognized private institutions, or contract hospitals.

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

CROSS REFERENCE: § 5.1, for the definition of “certified statement” and § 5.1 for the definition of “State”.

§ 5.136 Abandoned claims.

Except as provided in § 5.104(a), Certifying continuing eligibility to receive benefits, if a claimant does not furnish evidence in connection with a claim within 1 year after the date VA requests it, the claim will be considered abandoned. Once a claim is abandoned, the claimant must file a new claim for VA to take further action. If the claimant subsequently submits evidence that establishes a right to benefits, the effective date will not be earlier than the date of receipt of the new claim.

(Authority: 38 U.S.C. 501(a), 5103)

CROSS REFERENCE: § 5.150 General effective dates of awards or increased benefits.

§§ 5.137–5.139 [Reserved]

EVIDENCE REQUIREMENTS FOR FORMER PRISONERS OF WAR (POWS)

§ 5.140 Determining former prisoner of war status.

(a) Procedure for VA determinations of former prisoner of war (POW) status—(1) Service department findings. VA will accept the appropriate service department’s

finding that a veteran was a POW during a period of war unless a reasonable basis exists for questioning that finding, in which case, VA will make its own determination of former POW status.

(2) VA determinations. In addition to the basis stated under paragraph (a)(1) of this section, VA will make its own determination of former POW status if:

(i) The service department determined that the veteran was not a POW;

(ii) The service department did not make a determination regarding POW status; or

(iii) The detention or internment of the veteran occurred during a period other than a period of war.

(3) Role of the Director of the Compensation Service. The Director of the Compensation Service must approve all agency of original jurisdiction (AOJ) determinations of former POW status except when the AOJ accepted service department findings under paragraph (a)(1) of this section.

(b) Criteria for VA determinations of former POW status—(1) Definition of "former POW". Former POW means a veteran who, while serving in the active military service, was forcibly detained or interned in the line of duty by an entity described in paragraph (b)(1)(i) or (ii) of this section:

(i) An enemy, the agents of an enemy, or a hostile force, during a period of war; or

(ii) A foreign government or its agents, or a hostile force, under circumstances comparable to the circumstances under which a veteran generally has 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. In the absence of evidence to the contrary, VA will consider that each individual member of a particular group of detainees or internees experienced the same circumstances as those the group experienced generally.

(iii) Hostile force means any entity other than an enemy or foreign government or the agents of either whose acts further or enhance anti-American military, political, or economic objectives or views, or attempt to embarrass the U.S.

(2) Reason for detention or internment. For purposes of determining former POW status, VA will not consider the reason a veteran was detained or interned, except where allegations exist that the veteran violated the laws of a foreign government. A period of detention or internment by a foreign government for an alleged violation of its laws cannot be used to establish former POW status, unless the charges were a sham intended to make it appear that the detention or internment was proper.

(3) Line of duty. VA will consider that a forcible detention or internment was in the line of duty unless the evidence of record discloses that it was the proximate result of the veteran's willful misconduct. See §§ 5.660 and 5.661.

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

CROSS REFERENCE: § 5.1, for the definition of “agency of original jurisdiction”, and § 5.1 for the definition of “willful misconduct”. § 5.611, Philippine service: determination of

periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.

§ 5.141 Medical evidence for former prisoner of war disability compensation claims.

(a) Injuries and other conditions of a former prisoner of war (POW). As soon as sufficient evidence for a rating is available, VA will rate injuries or other conditions of a former POW that obviously were incurred in service, without awaiting receipt of the claimant's service treatment and other service records.

(b) Statements by a former POW. VA will presume as true a statement by a former POW that an injury or disease was incurred or aggravated during, or immediately before, detention or internment if the statement is consistent with the circumstances, conditions, or hardships of such service. This presumption may be rebutted by clear and convincing evidence to the contrary. See § 5.250(b)(2).

(c) Evidence from fellow servicemembers. A claimant may use evidence from a fellow servicemember to support an allegation of incurrence or aggravation of an injury or disease during detention or internment. In evaluating evidence from a fellow servicemember that relates to a former POW's claim for disability compensation, VA will take into account the fellow servicemember's statements, including, but not limited to, statements regarding any of the following factors:

(1) The former POW's physical condition before capture;

(2) The circumstances during the former POW's detention or internment;

(3) The changes in the former POW's physical condition following release from detention or internment; or

(4) The existence of signs and symptoms consistent with a claimed disability following the former POW's release from detention or internment.

(d) Absence of clinical records. If a former POW claims entitlement to disability compensation, VA will not consider the lack of history or findings in clinical records made upon the claimant's return to U.S. control as determinative.

(e) Disabilities first reported after discharge. If any disability is first reported after discharge, especially if the claimed disability is poorly defined and not obviously of intercurrent origin, VA will determine whether the claimed disability is etiologically related to the POW experience. VA will consider the circumstances of the claimant's detention or internment, the duration of detention or internment, and the pertinent medical principles.

(f) Examination requirement. If service connection for disabilities claimed by a former POW cannot be established otherwise, VA will provide the claimant a complete medical examination.

CROSS REFERENCES: § 5.140(b), concerning definition of "former POW"; § 5.264(b) and

(c), concerning diseases VA presumes are service connected in former prisoners of war.

(Authority: 38 U.S.C. 1154)

§§ 5.142–5.149 [Reserved]

General Effective Dates for Awards

§ 5.150 General effective dates of awards or increased benefits.

(a) General rule. Except as otherwise provided, the effective date of an award of pension, disability compensation, dependency and indemnity compensation, or monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea veteran, based on an original claim, a claim reopened after final denial, or a claim for increase, will be the later of:

(1) The date of receipt of the claim for the benefit; or

(2) The date entitlement arose. For purposes of this part, date entitlement arose means the date that the claimant first met the requirements for the benefit as shown by the evidence. VA will assume that entitlement arose before the date of receipt of the claim unless the evidence shows that entitlement arose after that date.

(b) Retroactive increase. VA will not award a retroactive increase or an additional benefit after discontinuing basic entitlement to a benefit, such as by

severance of service connection.

(c) Location of other part 5 effective-date provisions for awards or increased benefits. The following table is to assist the reader in locating various other effective-date provisions for awards or increased benefits in this part. It is provided for informational use only. This table does not confer any substantive rights.

Effective date provision	**Part 5 location**
SUBPART B – SERVICE REQUIREMENTS FOR VETERANS	
Individuals and groups designated by the Secretary of Defense as having performed active military service	§ 5.27(c)
Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits	§ 5.34(d)
Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits	§ 5.35(e)
SUBPART C – ADJUDICATIVE PROCESS, GENERAL	
Filing a claim for death benefits	§ 5.52(c)
Claims based on new and material evidence	§ 5.55(e)
Requirement to provide Social Security numbers	§ 5.101(d)
Abandoned claims	§ 5.136
Effective dates based on change of law or VA issue	§ 5.152(c)
Effective date of awards based on receipt of evidence prior to end of appeal period or before a final decision	§ 5.153
Revision of agency of original jurisdiction decisions based on clear and unmistakable error	§ 5.162(f)
Service department records as new and material evidence	§ 5.165(c), (d)
Effective dates for revision of decisions based on difference of opinion	§ 5.166
SUBPART D – DEPENDENTS AND SURVIVORS	
Effective date of awards of benefits for a dependent	§ 5.183
Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage	§ 5.205
Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death	§ 5.230
Effective date of an award of benefits due to termination of a	§ 5.235(b)

child's marriage	
SUBPART E – CLAIMS FOR SERVICE CONNECTION AND DISABILITY COMPENSATION	
Effective dates—award of disability compensation	§ 5.311
Effective dates—increased disability compensation	§ 5.312(b)
Effective dates—discontinuance ofcompensation for a total disability rating based on individual unemployability	§ 5.313
Effective dates—discontinuance of additional disability compensation based on parental dependency	§ 5.314
Effective dates—additional disability compensation based on decrease in the net worth of dependent parents	§ 5.315(b)
Effective dates—special monthly compensation under §§ 5.332 and 5.333	§ 5.335
Effective dates—additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321	§ 5.336(a)
Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156	§ 5.346(b)(1)(ii)
Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.	§ 5.351
SUBPART F – NONSERVICE-CONNECTED DISABILITY PENSIONS AND DEATH PENSIONS	
Disability requirements for Improved Disability Pension	§ 5.380
Effective dates of awards of Improved Disability Pension	§ 5.383
Effective dates of awards of special monthly pension	§ 5.392
Automatic adjustment of maximum annual pension rates	§ 5.401(a)
Effective dates of changes in Improved Pension benefits based on changes in net worth	§ 5.415(b)
Effective dates of changes to annual Improved Pension payment amounts due to a change in income	§ 5.422
Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income	§ 5.424(b), (c)
Effective dates of Improved Death Pension	§ 5.431
Effective dates of Improved Pension elections	§ 5.463
Annual income limits and rates for Old-Law Pension and Section 306 Pension	§ 5.471(b)
Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension	§ 5.478(b)
SUBPART G – DEPENDENCY AND INDEMNITY COMPENSATION, ACCRUED BENEFITS, AND SPECIAL RULES APPLICABLE UPON DEATH OF A BENEFICIARY	
Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild	§ 5.524

Awards of dependency and indemnity compensation when not all dependents apply	§ 5.525
When VA counts a parent's income for parent's dependency and indemnity compensation	§ 5.534
A parent's dependency and indemnity compensation rates	§ 5.536(b)
Effective date of an award or an increased rate based on decreased income: parents' dependency and indemnity compensation	§ 5.542
SUBPART H – SPECIAL AND ANCILLARY BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS	
Medal of Honor pension	§ 5.580(b)
Awards of benefits based on special acts or private laws	§ 5.581(d)
Minimum income annuity and gratuitous annuity	§ 5.587(b)
Special allowance payable under section 156 of Public Law 97–377	§ 5.588(b), (f)
Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.	§ 5.589(e)
Monetary allowance for a female Vietnam veteran's child with certain birth defects	§ 5.590(i)
Effective dates of awards for a disabled child of a Vietnam or Korea veteran	§ 5.591(a)
Clothing allowance	§ 5.606(e)
SUBPART I – BENEFITS FOR CERTAIN FILIPINO VETERANS AND SURVIVORS	
Payment at the full-dollar rate of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S.	§ 5.613(d)
Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor	§ 5.614
SUBPARK K – MATTERS AFFECTING THE RECEIPT OF BENEFITS	
Revocation of forfeiture	§ 5.680(c)(2)
Effective dates: forfeiture	§ 5.681
Presidential pardon for offenses causing forfeiture	§ 5.682(b)
SUBPART L – PAYMENTS AND ADJUSTMENTS TO PAYMENTS	
Beginning date for certain benefit payments	§ 5.693(b)
Payments to or for a child pursuing a course of instruction at an approved educational institution	§ 5.696(b)-(f)
Eligibility verification reports	§ 5.708(f), (g)
Payment to dependents due to the disappearance of a veteran for 90 days or more	§ 5.711(b)(2), (c)(2), (d)(1)
Resumption of special monthly compensation based on the	§ 5.721

need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	
Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	§ 5.725
Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care	§ 5.729
Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	§ 5.730
General effective dates for awarding, reducing, or discontinuing VA benefits because of an election	§ 5.743(a)
Entitlement to concurrent receipt of military retired pay and VA disability compensation	§ 5.745(e)
Prohibition against receipt of active military service pay and VA benefits for the same period	§ 5.746(d)(1)
Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act	§ 5.752(b)
SUBPART M – APPORTIONMENTS TO DEPENDENTS AND PAYMENTS TO FIDUCIARIES AND INCARCERATED BENEFICIARIES	
Effective date of apportionment grant or increase	§ 5.782
Determinations of incompetency and competency	§ 5.790(f)
General fiduciary payments	§ 5.791(e)
Institutional awards	§ 5.792(e)
Limitation on payments for a child	§ 5.793
Apportionment when a primary beneficiary is incarcerated	§ 5.814(e)
Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration	§ 5.815
Resumption of pension upon a beneficiary's release from incarceration	§ 5.816(a), (b)

(Authority: 38 U.S.C. 501(a), 5110(a))

§ 5.151 Date of receipt.

(a) General rule. The date of receipt of a document, claim, information, or evidence is the date on which VA received it, except as provided in the following:

(1) Paragraph (b) of this section;

(2) Provisions for claims or evidence received in a foreign country by a Department of State representative (§ 5.132(a));

(3) Provisions for applications, claims, and exchange of evidence with the Social Security Administration (§ 5.131(a) or (b)); or

(4) Provisions of the Department of Defense relating to initial claims filed at or before separation.

(b) Exception to date-of-receipt rule. If VA determines that a natural or man-made event causes extended delay or otherwise interferes with the normal receipt of correspondence in one or more VA regional office, it may establish an exception to paragraph (a) of this section for the office or offices involved by publishing notice of the exception in the Federal Register. The delay or other interference must affect the receipt of documents, claims, information, or evidence to an extent that, if not addressed, would adversely affect claimants through no fault of their own. If VA establishes an exception, it may use factors such as the postmark or the date the claimant signed the correspondence as the date of its receipt.

(Authority: 38 U.S.C. 501(a), 512(a), 5110)

§ 5.152 Effective dates based on change of law or VA issue.

(a) Liberalizing law or VA issue. Paragraphs (b) and (c) of this section apply when pension, disability compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea veteran, is awarded or increased pursuant to a liberalizing law or a liberalizing VA issue approved by the Secretary or at the Secretary's direction. The provisions of paragraphs (b) and (c) of this section apply to original claims, reopened claims, and claims for increase.

(b) Eligibility for retroactive benefits. For a claimant to be eligible for retroactive benefits based on the liberalizing law or VA issue, the evidence must show that:

(1) The claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue; and

(2) Such eligibility existed continuously from that date to the date of the administrative determination of entitlement or of the claimant’s request for review.

(c) Effective date of award. (1) General. The effective date of an award or increase based on a liberalizing law or VA issue will be the later of:

(i) The effective date of the liberalizing law or VA issue; or

(ii) The date entitlement arose.

(2) Review no later than 1 year after effective date. If VA reviews a claim on its initiative, or receives a claimant’s request to review a claim, no later than 1 year after the effective date of the law or VA issue, then VA may authorize benefits from that effective date.

(3) Review on VA initiative more than 1 year after effective date. If VA reviews a claim on its initiative more than 1 year after the effective date of the law or VA issue, it may authorize benefits for a period of 1 year before the date of administrative determination of entitlement.

(4) Review at the claimant's request that VA received more than 1 year after effective date. If VA reviews a claim at the claimant's request that VA received more than 1 year after the effective date of the law or VA issue, VA may authorize benefits for a period of 1 year prior to the date of receipt of such request.

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

(d) Reduction or discontinuance of benefits. If VA reduces or discontinues pension, disability compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea veteran pursuant to a change in law or a VA issue, or because of a change in interpretation of a law or VA issue, the following provisions apply.

(1) Notice. VA will send written notice of the proposed action to the beneficiary and furnish detailed reasons for the proposed reduction or discontinuance. The beneficiary will have 60 days after the date of the notice to present additional evidence.

(2) Effective date of award. If VA receives no additional evidence within the 60-day notice period in paragraph (d)(1) of this section, or if the evidence received does not demonstrate that the proposed action should not be taken, VA will pay a reduced rate or discontinue the benefit effective the first day of the month after the end of the notice

period.

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

§ 5.153 Effective date of awards based on receipt of evidence prior to end of appeal period or before a final Board decision.

VA will consider information or evidence received before the expiration of the period for initiating or perfecting an appeal to the Board of Veterans' Appeals (the Board), or before the Board renders a decision (if a timely appeal was filed), without regard to whether the information or evidence is "new and material". The effective date of an award based on such evidence will be as though the former decision had not been rendered.

CROSS REFERENCE: § 5.150, General effective dates of awards or increased benefits. For information on how to appeal to the Board, see 38 CFR parts 19 and 20.

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

§§ 5.154–5.159 [Reserved]

GENERAL RULES ON REVISION OF DECISIONS

§ 5.160 Binding effect of VA decisions.

(a) General rule. A decision of a duly constituted rating agency or other agency of original jurisdiction will be binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence of record at the time VA issues notice of the decision in accordance with 38 U.S.C. 5104. A binding agency decision will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §§ 5.161,5.162, and 5.163.

(b) Particular issues. A Veterans Service Center's decision on any one of the issues listed below is binding on the VA Insurance Center, and vice versa, unless the decision was based on clear and unmistakable error. Absent clear and unmistakable error, neither a Veterans Service Center nor the VA Insurance Center may change a decision of the other if doing so would involve applying the same criteria and be based on the same facts. The issues to which this paragraph (b) applies are:

(1) Line of duty;

(2) Character of discharge;

(3) Relationship;

(4) Dependency;

(5) Domestic relations issues such as marriage, divorce, adoption, and child custody and support;

(6) Homicide; and

(7) Findings of fact of death or presumption of death.

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

CROSS REFERENCE: § 5.1, for the definition of "agency of original jurisdiction".

§ 5.161 Review of benefit claims decisions.

(a) Timely Notice of Disagreement. A claimant who has filed a timely Notice of Disagreement (NOD) with a decision of an agency of original jurisdiction (AOJ) on a benefit claim has a right under this section to a review of that decision. The review will be conducted by a Veterans Service Center Manager or Decision Review Officer, at VA's discretion. A person who did not participate in the decision will conduct the review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. A review under this section will encompass only decisions with which the claimant has expressed disagreement in the NOD. The reviewer will consider all evidence of record and applicable law, and will give the prior decision no deference.

(b) Time to request a review. Upon receipt of an NOD, VA will send written notice to the claimant of his or her right to a review under this section, unless the NOD already includes a request for review of the decision under this section. To obtain such a review, the claimant must request it no later than 60 days after the date VA mails the notice. This 60-day limit may not be extended. If the claimant fails to request a review under this section no later than 60 days after the date VA send the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case (SOC). A claimant may not have more than one review under this section of the same

decision.

(c) Action by reviewer. The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the NOD, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. In an informal conference, the reviewer will explain fully the issues and suggest the submission of evidence the claimant may have overlooked that would tend to prove the claim. Upon the request of the claimant, the reviewer will conduct a hearing under § 5.82.

(d) Decision of reviewer. The reviewer may grant a benefit sought in the claim notwithstanding § 5.163, but he or she may not revise the decision in a manner that is less advantageous to the claimant than the decision under review, except as provided in paragraph (e) of this section. A review decision made under this section will include a summary of the evidence and of the reasons for the decision, a citation to pertinent laws, and a discussion of how those laws affect the decision.

(e) Reversal or revision of a prior decision. Notwithstanding any other provisions of this section, the reviewer may reverse or revise the AOJ decision being reviewed, or any prior decision that has become final due to failure to timely appeal, on the grounds of clear and unmistakable error, even if disadvantageous to the claimant. See § 5.162.

(f) Appeal rights. Review under this section does not limit the appeal rights of a

claimant. Unless a claimant withdraws his or her NOD as a result of this review process, VA will proceed with the traditional appellate process by issuing an SOC.

(g) Applicability. This section applies to all claims in which an NOD is filed after June 1, 2001.

(Authority: 38 U.S.C. 5109A, 7105(d))

CROSS REFERENCE: § 5.1, for the definition of "agency of original jurisdiction".

§ 5.162 Revision of agency of original jurisdiction decisions based on clear and unmistakable error.

(a) Scope. The provisions of this section apply to decisions of an agency of original jurisdiction (AOJ) except:

(1) Where an award was based on an act of commission or omission by the payee, or with his or her knowledge, see §§ 5.164 and 5.175;

(2) Where there is a change in law or VA issue, or a change in interpretation of law or VA issue, see § 5.152;

(3) Where the evidence establishes that service connection was clearly illegal; or

(4) As otherwise provided in this part.

(b) Review for clear and unmistakable error (CUE). At any time after the AOJ makes a decision, the claimant may request, or VA may initiate, AOJ review of the

decision to determine if there was CUE in the decision. The AOJ will base the review only on the evidence of record and the law in effect when the AOJ made the decision. If the review establishes CUE, the AOJ will reverse or revise the decision.

(c) Binding decisions and final decisions. (1) To be reviewable under (b) of this section, the decision must be binding as defined in § 5.160.

(2) To be reviewable under paragraph (b) of this section, the decision may, but need not, be final as defined in § 5.1.

(3) VA may reverse or revise a final decision only if there was CUE in that decision.

(d) What constitutes CUE. CUE is a very specific and rare kind of error. It is the kind of error of fact or of law that when called to the attention of later reviewers, compels the conclusion that the result would have been manifestly different if the error did not exist. The conclusion must be something about which reasonable minds cannot differ. Generally, either the correct facts, as they were known at the time, were not before the AOJ, or the statutory and regulatory provisions which existed at the time were incorrectly applied.

(e) Reduction or discontinuance based on administrative error or error in judgment. VA will reduce or discontinue a benefit resulting from an award based solely on a VA administrative error or error in judgment only if it was CUE. Administrative errors or errors in judgment include, but are not limited to:

(1) Overlooking facts;

(2) Clerical errors; or

(3) Failure to follow or properly apply VA regulations or statutes.

(f) Effective date of reversal or revision. For purpose of granting benefits, a new decision that constitutes a reversal or revision of a prior decision on the grounds of CUE has the same effect as if the new decision had been made on the date of the prior decision. In such cases, benefits are payable effective on the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision. See § 5.167(c) for effective date of reduction or discontinuance based on VA administrative error or error in judgment.

(Authority: 38 U.S.C. 5109A)

CROSS REFERENCE: § 5.1, for the definition of "agency of original jurisdiction".

§ 5.163 Revision of decisions based on difference of opinion.

If the Veterans Service Center Manager (VSCM) within an agency of original jurisdiction (AOJ) believes that revision of a previous AOJ decision is warranted, the VSCM will recommend the revision to the Director of the Compensation Service of the Veterans Benefits Administration for a binding determination. This section only applies to the revision of an AOJ decision that is not final and has not been the subject of a substantive appeal. The revision must be based on the VSCM's difference of opinion

with the previous decision, and must lead to a decision more favorable to the claimant than the previous decision.

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

CROSS REFERENCE: § 5.1, for the definition of "agency of original jurisdiction".

§ 5.164 Standard of proof for reducing or discontinuing a benefit payment or for severing service connection based on a beneficiary's act of commission or omission.

(a) General rule. VA will reduce or discontinue a benefit, or sever service connection, if a preponderance of the evidence shows that it resulted in whole or in part from an award based on an act of commission or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge. The review will be based on the law in effect when the agency of original jurisdiction (AOJ) made the decision and on all evidence currently of record, regardless of whether it was of record at that time.

(b) Examples of acts of commission or omission. Acts of commission or omission include, but are not limited to:

(1) An erroneous statement by a veteran regarding income;

(2) Failure to notify VA of a changed circumstance (such as death or marriage of a dependent);

(3) Failure to notify VA of an increase in income; or

(4) Obtaining a benefit by fraud.

(Authority: 38 U.S.C. 501(a), 5112(b)(9))

CROSS REFERENCE: § 5.1\, for the definition of “agency of original jurisdiction”, and § 5.1, for the definition of “fraud.”

§ 5.165 Service department records as new and material evidence.

(a) Reconsideration. Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding § 5.55. Such records include, but are not limited to:

(1) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of this section are met;

(2) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(3) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(b) Unobtainable records. Paragraph (a) of this section does not apply to records that VA could not have obtained when it decided the claim because they did not exist, or because the claimant failed to provide sufficient information for VA to identify

and obtain the records from the service department, the Joint Services Records Research Center, or any other official source.

(c) Effective date. An award made based all or in part on the records identified by paragraph (a) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(d) Retroactive disability rating. A retroactive rating of a disability subsequently service connected based on 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 rating will be assigned accordingly, except as it may be affected by the filing date of the original claim.

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

§ 5.166 Effective dates for revision of decisions based on difference of opinion.

If VA revises a decision based on difference of opinion under § 5.163,,the effective date of the revision is the date the benefits would have been paid if the previous decision had been favorable.

(Authority: 38 U.S.C. 501(a), 5110)

§ 5.167 Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on omission or commission, or based on administrative error or error in judgment.

(a) Scope. This section applies when determining the proper effective date to assign for the reduction or discontinuance of payment of a benefit, or the severance of service connection, based on error. This section does not apply to a payment amount not authorized by a rating decision, such as a payment of an incorrect amount or a duplicative payment. Such amounts are overpayments, subject to recoupment.

(b) Effective date of reduction or discontinuance of a payment, or of severance of service connection, based on beneficiary's act of commission or omission. If VA based an award of a benefit, including service connection, on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, including, but not limited to, an act based on fraud, VA will pay a reduced rate, discontinue a benefit, or sever service connection, effective the latest of the following dates:

(1) The effective date of the award;

(2) The day preceding the act of commission or omission; or

(3) The date entitlement to the benefit ceased.

(c) Effective date of reduction or discontinuance of a payment, or of severance of service connection, based on VA administrative error or error in judgment. Except as provided in § 5.177(d) and (f), if an award was based solely on VA administrative error

or error in judgment, VA will pay a reduced rate or discontinue a benefit, or sever service connection,effective the first day of the month after the month for which VA last paid the benefit.

(Authority: 38 U.S.C. 5112(b)(9) and (10))

§§ 5.168–5.169 [Reserved]

GENERAL RULES ON PROTECTION OR REDUCTION OF EXISTING RATINGS

§ 5.170 Calculation of 5-year, 10-year, and 20-year periods to qualify for protection.

(a) Scope. VA will apply the following principles in determining whether service connection has been "in effect" for the 10-year period in § 5.175 and whether a rating has been "continuous" for the 5-year period in § 5.171 or the 20-year period in § 5.172.

(b) A qualifying period for protection of service connection or of a disability rating begins on the date the award or grant of benefits is effective and ends, after due process has been provided, on the date that service connection would be severed or the rating would be reduced.

(c) Veteran reenters active military service. For purposes of §§ 5.171 and 5.172, a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active military service.

CROSS REFERENCE: § 5.746, Prohibition against receipt of active military service pay and VA benefits for the same period.

(d) Protected rating during nonreceipt of disability compensation. A rating that is continuous for a period listed in paragraph (a) of this section is protected even if the beneficiary did not receive VA disability compensation based on that rating. This includes a beneficiary whose payments were adjusted by deduction, recoupment, apportionment, or reduction in disability compensation due to incarceration, or because the beneficiary elected to receive retirement pay.

(e) Retroactive increase or award. A retroactive increase in benefits or award of service connection, including one made under § 5.162, which results in a veteran being rated or awarded service connection for a period of 5, 10, or 20 years will be protected under §§ 5.171, 5.175, and 5.172, respectively. This paragraph (e) applies to any qualifying period for protection, even if it includes a period based on a retroactive award.

(Authority: 38 U.S.C. 110, 501(a), 1159)

§ 5.171 Protection of 5-year stabilized ratings.

(a) Purpose. VA will adjudicate cases affected by change of medical findings or diagnosis to produce the greatest degree of stability of disability ratings consistent with the laws and regulations governing disability compensation and pension.

(b) Stabilized rating. For purposes of this section, if VA has rated a disability at or above a specific level for 5 years or more, then VA will consider it to be stabilized at that level.

(c) Material improvement. VA will not reduce a stabilized rating unless there is evidence of material improvement. VA may reduce a stabilized rating if:

(1) An examination shows material improvement in the disability under the ordinary conditions of life, as explained in paragraph (d) of this section; and

(2) The evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.

(d) How VA determines whether there has been material improvement. VA will consider the following to determine whether a disability has materially improved:

(1) Whether examination shows improvement. To be a basis for reduction, a medical examination must be as complete as those on which payments were authorized or continued and must demonstrate improvement.

(2) Whether a disease is subject to episodic improvement. VA will not reduce the rating of a disease that is subject to temporary or episodic improvement on the basis of only one examination unless the evidence of record clearly demonstrates sustained improvement. Diseases subject to temporary or episodic improvement include, but are not limited to:

(i) Arteriosclerotic heart disease;

(ii) Bronchial asthma;

(iii) Epilepsy;

(iv) Gastric or duodenal ulcer;

(v) Bipolar disorders or other psychotic reaction;

(vi) Anxiety disorders; and

(vii) Many skin diseases.

(3) Whether apparent improvement is due to bed rest. VA will not reduce a stabilized rating of a disease that becomes comparatively symptom free (findings absent) after bed rest based on an examination that reflects the results of bed rest.

(4) Whether evidence clearly demonstrates improvement. VA will find material improvement only if the evidentiary record clearly demonstrates, after full compliance with the procedure outlined in paragraph (d) of this section, that the disability does not meet the requirements for the current disability rating.

(5) Whether VA's review is based on a complete medical record. A complete medical record includes all of the following elements, if such records exist:

(i) The entire case history;

(ii) Medical-industrial history;

(iii) Records related to treatment of intercurrent diseases and exacerbations, including, but not limited to, hospital reports, bedside examinations, examinations by designated physicians, and examinations that reflect the results of tests conducted by laboratory facilities and the cooperation of specialists in related lines;

(iv) Private and VA medical examination records; and

(v) Special examinations indicated as a result of general examination.

(6) Whether there is a new or changed diagnosis. Where there is evidence of a change in diagnosis, VA will follow 38 CFR 4.13 (Effect of change of diagnosis), as well as this section. VA will consider whether evidence of a change in diagnosis represents a progression of the previously diagnosed condition, an error in prior diagnosis, or a disease entity independent of the service-connected disability. When a new diagnosis reflects only a mental deficiency or personality disorder, VA will consider the possibility of temporary remission of a super-imposed psychiatric disease.

(e) Reexamination following a change in diagnosis. If VA cannot determine whether evidence of a change in diagnosis represents a progression of the previously diagnosed condition, an error in prior diagnosis, or a disease entity independent of the service-connected disability after considering the evidence as described in paragraphs (c) and (d) of this section, VA will continue the assigned rating. VA will cite the former diagnosis with the new diagnosis, if any, in parentheses, with a notation that the rating will be continued pending reexamination, to be conducted on a date to be determined on the basis of the facts of each individual case.

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

CROSS REFERENCE: § 5.102, concerning VA criteria for scheduling reexaminations.

§ 5.172 Protection of continuous 20-year ratings.

(a) Disability compensation rating. If VA has rated a disability at or above a

specific level for 20 years, then VA may not reduce the rating below such level unless the rating was based on fraud.

(b) Pension rating. VA will not reduce a permanent total disability rating for pension purposes that VA has continuously provided for 20 or more years unless the rating was based on fraud.

(c) Effect of election regarding receipt of disability compensation. The provisions of paragraph (a) or (b) of this section apply regardless of whether the veteran elects to receive disability compensation or pension during all or any part of the 20-year period.

(Authority: 38 U.S.C. 110)

CROSS REFERENCE: §§ 5.1, for the definition of "fraud"; 5.164, Standard of proof for reducing or discontinuing a benefit payment or for severing service connection based on a beneficiary's act of commission or omission.

§ 5.173 Protection against reduction of disability rating when VA revises the Schedule for Rating Disabilities.

VA will not apply a revision of the schedule for rating disabilities to reduce a disability rating existing on the effective date of the revision unless medical evidence establishes that the disability has actually improved.

(Authority: 38 U.S.C. 1155)

§ 5.174 Protection of entitlement to benefits established before 1959.

(a) Persons 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 VA on December 31, 1958, may continue to receive such benefits as long as the conditions warranting the payment under those laws continue, unless there was fraud, clear and unmistakable error of fact or law, or misrepresentation of material facts. VA will pay the greater benefit under the previous law or the corresponding current section of title 38 U.S.C. in the absence of an election to receive the lesser benefit.

(Authority: Pub. L. 85-857, 72 Stat. 1105)

(b) Service connection established under prior laws. Awards of service connection and the rate of disability compensation paid under prior laws repealed by Public Law 85-56 are protected, provided that the conditions warranting such status and rate continue and the award was not based on fraud, misrepresentation of facts, or clear and unmistakable error. With respect to such protected awards, VA may grant disability compensation and special monthly compensation under current law if such award would result in disability compensation payment at a rate equal to or higher than that payable on December 31, 1957. Where a changed physical condition warrants re-rating of service-connected disabilities, the amounts of disability compensation and special monthly compensation will be determined under 38 U.S.C. 1114.

(Authority: Pub. L. 85-86, 71 Stat. 277; Pub. L. 85-857, 72 Stat. 1105)

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.175 Severance of service connection.

(a) Protected service connection. (1) VA may not sever service connection that has been in effect for 10 years or more unless evidence shows that:

(i) The original grant was obtained by fraud; or

(ii) It is clear from military records that the person identified as a veteran did not have the requisite qualifying military service or the veteran's discharge from service is of a type to preclude service connection as described in § 5.30.

(2) The protection afforded in this section applies to determinations of service connection that were the basis for grants of entitlement to dependency and indemnity compensation (DIC), and to disability compensation or DIC granted under 38 U.S.C. 1151.

(b) Standard of proof to sever service connection—general rule. (1) VA will sever service connection if evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon VA), except as provided in paragraph (c) of this section. Severance under this paragraph (b) is subject to §§ 5.152 and 5.83(a) (regarding due process procedures).

(2) A change in diagnosis may be accepted as a basis for severance of service connection if the examining physician or physicians or other proper medical authority

certifies that, in the light of all accumulated evidence, the diagnosis that was the basis of the award of service connection is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion that the diagnosis is erroneous.

(c) Standard of proof to sever service connection—fraud. See § 5.164, for standard of proof to sever service connection for act of commission or omission; see § 5.83(a), for due process procedures for severing service connection.

(Authority: 38 U.S.C. 1159, 5104)

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.176 [Reserved]

§ 5.177 Effective dates for reducing or discontinuing a benefit payment or for severing service connection.

(a) Suspended awards. If an award has been suspended and it is determined that no additional payments are in order, VA will discontinue the award effective the first day of the month after the month for which VA last paid benefits.

(b) Running awards. If an award is running, VA will discontinue the award effective as appropriate under paragraphs (c) through (h) of this section.

(c) Severance of service connection. Unless severance is based on the beneficiary's act of commission or omission that resulted in VA's grant of benefits, this paragraph applies if VA severs service connection. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83, VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will sever service connection effective the first day of the month after the second 60-day period. See § 5.167 for effective date of severance of service connection obtained by fraud.

(d) Character of discharge or line of duty. This paragraph (d) applies if VA discontinues benefits based on a determination as to character of discharge or line of duty. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83(a), VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will discontinue benefits effective the first day of the month after the second 60-day period.

(e) Disability compensation. This paragraph (e) applies if VA reduces or discontinues disability compensation because of a change in service-connected disability or employability status. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83(a), VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will pay a reduced rate or discontinue disability compensation effective the first day

of the month after the second 60-day period.

(f) Pension. This paragraph (f) applies if VA reduces or discontinues pension payments because of a change in disability or employability status. In such cases, VA will reduce the rate or discontinue pension effective the first day of the month after notice to the beneficiary of the final decision.

(g) Chapter 18 monetary allowance. If, after providing the 60-day notice period described in § 5.83(a), VA reduces or discontinues chapter 18 monetary allowance, it will apply the effective date provision in § 5.591(b)(5).

(h) Other. The effective dates of reductions or discontinuances not listed in this section will be as stated in the sections listed in the table in § 5.705.

(i) Exceptions. This section does not apply if the reduction or discontinuance involves:

(1) A change in law or a VA administrative issue or a change in interpretation of law or VA issue; if so, apply § 5.152;

(2) An award that was erroneous due to an act of commission or omission by the beneficiary or with the beneficiary's knowledge; if so, apply § 5.167(b), regarding effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on commission or omission, or based on administrative error or error

in judgment; or

(3) An award that was based solely on administrative error or an error in judgment by VA; if so, apply § 5.166. However, this paragraph (i)(3) does not apply to severance of service connection under paragraph (c) of this section or to reduction of disability compensation under paragraph (e) of this section.

(Authority: 38 U.S.C. 1110, 1131, 1117, 5112)

§§ 5.178-5.179 [Reserved]

Subpart D—Dependents and Survivors

GENERAL DEPENDENCY PROVISIONS

§ 5.180 [Reserved]

§ 5.181 Evidence needed to establish a dependent.

(a) Scope. This section describes general types of evidence used to establish the existence of a dependent.

(b) Using a statement to establish a dependent. Except as provided in paragraph (c) of this section, VA will accept a claimant's or beneficiary's statement as sufficient proof of marriage, termination of marriage, or birth of a child. The statement must contain all of the following information, if applicable:

(1) The date (month, day, and year) and place (city and state, or country if outside of a state) of the:

(i) Marriage;

(ii) Marriage termination; or

(iii) Birth;

(2) The full name of the person whose dependency is asserted, and the person's relationship to the claimant;

(3) The Social Security number of the person whose dependency is asserted; and

(4) The name and address of the person who has custody of any child whose dependency is asserted, if the child does not reside with the claimant.

(c) When a statement alone is not sufficient. VA will require additional supporting evidence to establish a veteran's marital status or a parent/natural child relationship, as set forth in §§ 5.192(c), 5.193, 5.221, 5.229, and 5.500, if any of the following factors are true:

(1) The statement does not contain all of the applicable information required by paragraphs (b)(1) through (4) of this section;

(2) The claimant or beneficiary does not reside in a State;

(3) VA questions the accuracy of all or part of the statement;

(4) The statement conflicts with other evidence in the record; or

(5) There is a reasonable indication, either in the statement or in other evidence in the record, of fraud or misrepresentation of the relationship in question.

(d) Photocopies accepted. If VA is satisfied that photocopies are authentic and free from alteration, then VA will accept them to establish birth, death, marriage, or relationship under this section, or to prove a change in dependency under § 5.182. Otherwise, VA may require certified copies of documents from the custodian of the documents, bearing the custodian's signature and official seal.

(Authority: 38 U.S.C. 501(a), 5124)

CROSS REFERENCE: § 5.1, for the definitions of "custody of a child," "fraud," and "State."

§ 5.182 Change in status of dependents.

(a) Beneficiary's duty to report. A beneficiary must provide VA a statement containing the details of any change in dependency that could lead to a reduction or discontinuance of benefits. The beneficiary must report the date (month, day, and year) and place (city and state, or country if outside of a state) of any of the following events:

(1) Marriage;

(2) Annulment of marriage;

(3) Divorce;

(4) Death of a dependent; or

(5) Change in status of a living child affecting his or her status as a dependent.

(b) Evidence of changes. VA will accept a beneficiary's statement of a change in the status of a dependent under this section as proof of the change if VA has no information contradicting the statement. Otherwise, VA will require additional proof regarding the matter as specified elsewhere in subpart D.

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

CROSS REFERENCE: § 5.104, "Certifying continuing eligibility to receive benefits

§ 5.183 Effective date of award of benefits for a dependent.

(a) General rule. Except as provided in paragraph (b) of this section, the effective date of the award of benefits for a dependent is the date the claimant or beneficiary informs VA of the existence of the dependent, subject to the following conditions:

(1) Additional evidence. If VA requests additional evidence based on the information of the existence of the dependent, the claimant or beneficiary must provide such evidence no later than 1 year after VA's request. If the claimant or beneficiary provides the requested evidence more than 1 year after VA's request, the effective date of the establishment of a dependent on the claimant's or beneficiary's award will be the date VA receives such evidence.

(2) Date of dependency. No award will be effective before the date dependency arose.

(3) Date of original claim. No award will be effective before the date of an original claim for benefits or the date of a claim for increased benefits.

(b) Specific applications and exceptions. In the following circumstances, and subject to paragraphs (a)(1), (2), and (3) of this section, the effective date of an award for a dependent will be:

(1) Marriage. The date of marriage, if VA receives information about the marriage no later than 1 year after the event.

(2) Birth. The date of the birth of a child, if VA receives information about the birth no later than 1 year after the event.

(3) Adoption. For an adoption, the earliest of the following dates, as applicable, if VA receives information about the adoption no later than 1 year after the adoption:

(i) The date of the adoption placement agreement;

(ii) The date of the interlocutory (temporary) adoption decree; or

(iii) The date of the final adoption decree.

(4) Date of qualifying disability rating. The effective date of the qualifying disability rating, if VA receives information of the dependency no later than 1 year after the date VA sent notice of the rating action to the claimant or beneficiary.

(5) Date of original award. The same day as the effective date of the original award of benefits other than benefits for a dependent, if:

(i) Benefits for a dependent are claimed on the same benefit application used to file the claim for the original award of benefits; or

(ii) VA receives information to establish a dependent no later than 1 year after the effective date of the original award of benefits.

(Authority: 38 U.S.C. 5103(b), 5110(a), (f), (n))

CROSS REFERENCE: § 5.235, Effective date of an award of benefits due to termination of a child's marriage.

§ 5.184 Effective date of reduction or discontinuance based on changes in dependency status.

Except for Old-Law Pension or Section 306 Pension, the effective date of a reduction or discontinuance based on an event that changes the status of a dependent will be determined as follows:

(a) Change in dependency due to death, divorce, or annulment. VA will pay a reduced rate or discontinue benefits effective the first day of the month after the month in which the death occurred or in which the divorce or annulment became effective.

(b) Change due to marriage, remarriage, or beginning of inferred marital relationship. See §§ 5.197 and 5.203(b)(2).

(c) Changes in status of child dependents. The effective date of a reduction or discontinuance based on changes in child status will be determined as follows:

(1) Child reaches age 18 or 23. See § 5.231.

(2) Child no longer qualifies as adopted child. See § 5.232.

(3) Stepchild leaves veteran's household. See § 5.233.

(4) Child no longer permanently incapable of self support. See § 5.234.

(d) Effective date of reduction or discontinuance based on change in status. Notwithstanding any other section of this part, if VA cannot determine the month, day, and year of an event that changes the status of a dependent, then VA will reduce or discontinue benefits effective the first day of the month after the month VA last paid benefits.

(Authority: 38 U.S.C. 5112(b)(2))

CROSS REFERENCE: § 5.477,Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

§§ 5.185–5.190 [Reserved]

MARRIAGE, DIVORCE, AND ANNULMENT

§ 5.191 Marriages VA recognizes as valid.

A valid marriage for VA purposes is one between persons of the opposite sex that was:

(a) Valid under the law of the place where the persons lived at the time of the marriage;

(b) Valid under the law of the place where the persons lived at the time entitlement to benefits arose; or

(c) Deemed valid under § 5.200, for claims involving a surviving spouse.

(Authority: 38 U.S.C. 101(31), 103(c))

§ 5.192 Evidence of marriage.

(a) Scope. This section describes the evidence of marriage VA will accept when supplementary evidence is required in addition to the statement described in § 5.181(b).

(b) Evidence of a valid marriage. VA will accept evidence as prescribed in paragraph (c) of this section as proof of a valid marriage under § 5.191, unless there is contrary evidence of record. If either party to the marriage was previously married, the claimant or beneficiary must provide VA with a certified statement of the date, place, and circumstances under which any prior marriage ended.

(c) Acceptable evidence of marriage. In order to prove a valid marriage, a claimant must file a statement as prescribed in § 5.181. If the statement is insufficient

under § 5.181(c), VA will accept as additional supporting evidence the first of the following items that is obtainable; VA will not accept a lower item unless it is established that the items listed above it are unobtainable:

(1) A copy or abstract of the public record of marriage, or a copy of the church or other religious-context record of marriage. The copy or abstract must include the names of the persons married, the date and place of the marriage, and the number of any prior marriages if shown on the official record.

(2) An official report from the service department if the veteran is a party to the marriage and the marriage took place during the veteran's military service.

(3) An affidavit from the official or clergyman who performed the ceremony.

(4) The original marriage certificate if VA 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) For informal or common-law marriages in jurisdictions where marriages other than by ceremony are recognized:

(i) A copy of the State's acknowledgement of registration, if the State has a procedure for registering informal or common-law marriages; or

(ii) The affidavit or certified statement of one of the parties to the marriage, giving all the facts and circumstances concerning the marriage. This includes details of the agreement made by the parties at the time they began living together, the length of time in months and years they have lived together, the location of each residence and the dates the parties lived there, and whether a child was born of the relationship. Such

affidavits or certified statements must be accompanied by affidavits or certified statements from two or more persons who know from personal observation the relationship that existed between the parties. The affidavits or statements of these persons must include when the parties lived together, the places of the parties' residence, whether they referred to themselves as married in the communities they lived in, and whether those communities generally accepted them as being married.

(7) Any other evidence that would reasonably allow a VA decisionmaker to conclude that a valid marriage did occur.

(Authority: 38 U.S.C. 103(c), 501(a))

CROSS REFERENCE: § 5.1, for the definition of "certified statement," "child born of the marriage," and "State." § 5.200, Surviving spouse: requirement of valid marriage to veteran.

§ 5.193 Proof of marriage termination where evidence is in conflict or termination is contested.

If there is conflicting evidence of record regarding marriage termination, or the evidence of record is contested by an interested party, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will accept as additional supporting evidence any of the following items:

(a) Proof of the former spouse's death;

(b) Proof of divorce as specified in § 5.194(b) or (c), as applicable; or

(c) A court-certified copy of the final decree of annulment or a court-certified abstract of such a decree.

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

§ 5.194 Acceptance of divorce decrees.

(a) General rule. (1) VA will accept as valid a divorce decree that is regular (proper) on its face unless its validity is challenged by either of the following persons:

(i) One of the parties named in the divorce decree; or

(ii) Any person whose entitlement to benefits would be affected if VA recognizes the decree as valid.

(2) In case of such a challenge, VA will make an independent decision about the validity of the divorce decree based on the criteria in paragraph (b) or (c) of this section, as applicable.

(b) Challenged divorce decree—party to the divorce has not remarried. If a person whose divorce decree is challenged has not remarried, VA will accept the divorce decree as valid if all the following conditions are met:

(1) The person who obtained the divorce had a permanent residence in the place where the divorce decree was issued;

(2) The person satisfied all the legal requirements for obtaining a divorce in the place in which the divorce decree was issued; and

(3) VA has the original divorce decree, a court-certified copy of the original decree, or a court-certified abstract of the original decree.

(c) Challenged divorce decree—party to the divorce has remarried—(1) General rule. Except as provided in paragraph (c)(2) of this section, if the issue is whether a remarried person is validly divorced from a prior spouse, then VA will accept the validity of the challenged divorce decree if either:

(i) The law of the place where the parties were living when they were married recognizes the validity of the divorce decree; or

(ii) The law of the place where the parties were living when the right to benefits arose recognizes the validity of the divorce decree.

(2) Foreign decree granted to residents of a State. If the issue is whether a remarried person's foreign divorce is valid, VA will accept the validity of the challenged divorce decree if both of the following conditions are met:

(i) The law of the State in which the persons lived at the time they obtained the divorce decree recognizes the decree as valid; and

(ii) No court of last resort has found the divorce decree invalid in the places where the persons lived when they were married or when the right to benefits arose.

(Authority: 38 U.S.C. 103(c), 501(a))

CROSS REFERENCE: § 5.1, for the definition of “State.”

§ 5.195 [Reserved]

§ 5.196 Void or annulled marriages.

(a) Void marriage. (1) General rule. A marriage is void if at least one party to the marriage did not meet the legal requirements for entering into the marriage at the time the marriage took place. Examples of void marriages include marriages in which at least one party was already married and marriages in which at least one party did not meet the minimum age requirement for marriage. VA Regional Counsel will determine whether a marriage is void under the law of the place that governs the validity of the marriage’s. See § 5.191.

(2) Evidence. To establish that a marriage was void, VA must receive a certified statement from the claimant or beneficiary describing the facts that made the marriage void. VA may require the claimant or beneficiary to file additional evidence as the individual circumstances may require. See § 5.1 for the definition of “certified statement”.

(b) Annulled marriage. To establish that a marriage has been annulled, VA must receive a copy or abstract of the court’s annulment decree. VA will accept the decree as valid unless one of the following conditions applies:

(1) The copy or abstract of the decree discloses irregularities;

(2) VA has reason to question the court's authority to issue the annulment decree; or

(3) There is evidence to show that the annulment might have been obtained by fraud of either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(c), (d), (e), 501(a))

CROSS REFERENCE: § 5.1, for the definition of "certified statement", and § 5.1 for the definition of "fraud".

§ 5.197 Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.

When a reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation is required based on marriage or remarriage, VA will pay the reduced rate or discontinue benefits as follows:

(a) Beneficiary or apportionee. VA will pay the reduced rate or discontinue benefits effective the first day of the month in which the marriage or remarriage of a beneficiary or apportionee occurred.

(b) Dependent of a beneficiary. VA will pay the reduced rate or discontinue benefits effective the first day of the month after the month in which the marriage or remarriage of a dependent of a beneficiary occurred.

(Authority: 38 U.S.C. 5112(b)(1), 5112(b)(2))

CROSS REFERENCE: § 5.477,Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

§§ 5.198–5.199 [Reserved]

SURVIVING SPOUSE STATUS

§ 5.200 Surviving spouse: requirement of valid marriage to veteran.

(a) Surviving-spouse status. To qualify as a surviving spouse, a person must satisfy one or the other of the following sets of requirements:

(1) The requirements of § 5.191; or

(2) The requirements of paragraph (b) of this section

(b) Marriages deemed valid. For purposes of entitlement to death benefits, VA will deem valid an attempted marriage between a veteran and a person for or by whom surviving-spouse status is sought ("the person") if all of the following criteria are met:

(1) There must have been an attempt at legal marriage. The person must have attempted to marry the veteran, and must have believed that a valid marriage resulted. The marriage must have endured continuously for at least 1 year immediately preceding, and including, the date of the veteran's death, unless a child was born of or before the marriage. If a child was born of or before the marriage, then the marriage may have been of any duration.

(2) No knowledge of legal impediment. VA will accept as true a signed statement from the person indicating that he or she had no knowledge of a legal impediment at the time of the attempted marriage. VA will accept the statement as true if the person files evidence of the attempted marriage acceptable under § 5.192(c) satisfies the other requirements in this section, and there is no contradictory evidence. VA will apply the following guidelines to determine whether a person had knowledge of a legal impediment:

(i) Only the person's knowledge at the time of the attempted marriage, but not knowledge acquired after the marriage, is relevant.

(ii) Legal impediments include, but are not limited to:

(A) One of the parties being underage;

(B) One of the parties lacking mental capacity to contract marriage;

(C) The parties being too closely related to marry under state law;

(D) Failing to comply with procedural prerequisites under State law, such as obtaining a blood test or marriage license, or fulfilling a length-of-residence requirement;

(E) One of the parties having a prior undissolved marriage at the time of the attempted marriage; or

(F) In a jurisdiction that does not recognize common-law marriages, the parties' failing to marry through a marriage ceremony.

(iii) If the person files a signed statement that he or she had no knowledge of the impediment to the marriage but there is evidence showing otherwise, VA will not deem the marriage valid.

(3) Continuous cohabitation. The person lived continuously with the veteran from the day of the marriage to the day of the veteran's death. See § 5.201(b).

(4) No surviving spouse. There is no surviving spouse, as defined in § 5.201, who has filed a claim for death benefits, and whom VA has determined is entitled to such benefits. However, a surviving spouse's entitlement to accrued benefits does not prevent another claimant from being considered the veteran's surviving spouse through a marriage deemed valid under this section.

(Authority: 38 U.S.C. 103(a), 501(a))

CROSS REFERENCE: § 5.1, for the definition of "State". § 5.432, Deemed valid marriages and contested claims for Improved Death Pension.

§ 5.201 Surviving spouse: requirements for relationship with the veteran.

(a) Definition. Except as provided in § 5.203, a surviving spouse is a person who meets all of the following requirements:

(1) The person was married to the veteran at the time of the veteran's death;

(2) The marriage was valid under § 5.191; and

(3) The person "lived continuously" with the veteran under paragraph (b) of this section, from the date of marriage to the date of the veteran's death.

(b) Lived continuously. The following considerations apply when determining whether a person lived continuously, also referred to in this part as continuous cohabitation, with a veteran:

(1) Whether there was more than one marriage to the veteran. If a surviving spouse has been legally married to the same veteran more than once, VA will use the date of the original marriage to decide whether the surviving spouse has met the marriage date requirements.

(2) Whether the person was at fault in the separation—(i) Criteria. Even if the veteran and the person separated during the marriage, the continuous cohabitation requirement of paragraph (a)(2) of this section is met if:

(A) The person was not at fault in causing the separation; and

(B) The veteran brought about the separation or the veteran's misconduct caused the separation.

(ii) When misconduct occurred. In determining who was at fault in causing the separation, VA will consider the veteran's and the other person's misconduct at the time of the separation, but not misconduct after the separation.

(3) Whether a separation was by mutual consent. VA will not consider a separation to have broken the continuity of cohabitation if the evidence shows it was by mutual consent for a purpose such as the convenience, health, or business of one or

both persons in the marriage, and the person had no intent to desert the veteran or abandon the marriage.

(4) Whether a separation with estrangement was temporary. A separation with estrangement occurring during the course of the marriage, regardless of who is at fault, does not break the continuity of cohabitation if the parties are no longer estranged at the time of the veteran's death.

(5) Whether evidence contradicts the statement. VA will accept the person's statement explaining the reason for the separation from the veteran in the absence of contradictory evidence.

(6) State law not controlling. State laws do not control VA's determination whether separation has resulted from desertion. VA will, however, consider findings of fact made in court decisions dealing with this issue that were made during the lifetime of the veteran.

(Authority: 38 U.S.C. 101(3), 103(d)(3), 501(a), 5110(a), 5112(b)(1))

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.202 [Reserved]

§ 5.203 Effect of remarriage on a surviving spouse's benefits.

(a) General rule. VA will not recognize a person as the surviving spouse of a veteran if either of the following is true:

(1) The person has remarried. In determining eligibility for benefits, VA will accept the decision of a Federal court that a person has not remarried if the decision was in a case to which the U.S. Government was a party.

(2) The person has held himself or herself out to the public as the spouse of another person as described in paragraph (b) of this section.

(Authority: 38 U.S.C. 101(3))

(b) Holding oneself out as a spouse—(1) General rule. For purposes of this part, a person has held himself or herself out as the spouse of another person if, after September 19, 1962, and after the death of the veteran, the person:

(i) Lived with a person of the opposite sex; and

(ii) Held himself or herself out to the public, through a pattern or course of conduct, as the spouse of that person.

(2) Effective date of discontinuance of benefits to a surviving spouse who holds himself or herself out as the spouse of another person. If a surviving spouse holds himself or herself out as the spouse of another person, then VA will discontinue that surviving spouse's benefits effective the first day of the month that the inferred marital relationship began.

(3) Effective date of resumption of dependency and indemnity compensation to a surviving spouse who stops holding himself or herself out as the spouse of another. If a surviving spouse no longer holds himself or herself out as the spouse of another, and

he or she files a claim for dependency and indemnity compensation (DIC), then VA will resume benefits effective the later of:

(i) The date the surviving spouse no longer held himself or herself out under paragraph (b)(1) of this section; or

(ii) The date VA receives a claim for benefits from the surviving spouse.

(c) Remarriages that do not preclude status as a surviving spouse. Remarriage will not prevent VA from recognizing a person as a surviving spouse if the remarriage was either:

(1) Void (see § 5.196); or

(2) Annulled by a court having authority to annul the marriage, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(d)(1))

(d) Reinstatement of eligibility for benefits for a surviving spouse who, because of remarriage, may have been ineligible for benefits under laws in effect before January 1, 1971, and whose remarriage ended before November 1, 1990. After December 31, 1970, none of the following elements will prevent a surviving spouse who may have been ineligible for benefits under laws in effect before January 1, 1971, because of remarriage, from receiving benefits:

(1) Remarriage that ended by death before November 1, 1990;

(2) Remarriage that ended by divorce provided that proceedings began before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties;

(3) Remarriage that was dissolved by a court with authority to render divorce decrees in legal proceedings begun by the surviving spouse before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties; or

(4) The surviving spouse has held himself or herself out as the spouse of another person, if competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out as that person's spouse before November 1, 1990. Such evidence may consist of the surviving spouse's certified statement of the fact.

(Authority: 38 U.S.C. 501(a); Sec. 4, Pub. L. 91-376, 84 Stat. 789; Sec. 8004, Pub. L. 101-508, 104 Stat. 1388-343; Sec. 502, Pub. L. 102-86, 105 Stat. 424; Sec. 103, Pub. L. 102-568, 106 Stat. 4322)

(e) Reinstatement of eligibility for DIC for a surviving spouse who, because of remarriage, may have been ineligible for DIC under laws in effect before June 9, 1998—(1) Termination of remarriage. None of the following elements will prevent a surviving spouse who may have been ineligible for DIC under laws in effect before June 9, 1998, because of remarriage, from receiving benefits:

(i) Remarriage ended by death;

(ii) Remarriage ended by divorce, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties; or

(iii) The surviving spouse has held himself or herself out as the spouse of another person, if competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out as that person's spouse. Such evidence may consist of the surviving spouse's certified statement of the fact.

(2) Limitation. No payment may be made under this paragraph (e) for any period before October 1, 1998.

(Authority: 38 U.S.C. 103(d)(2); Sec. 8207, Pub. L. 105-178, 112 Stat. 495)

(f) Remarriages after age 57. (1) A surviving spouse's remarriage after reaching age 57 will not prevent the surviving spouse from receiving DIC if the surviving spouse remarried after December 15, 2003.

(2) No payment may be made under this paragraph (f) for any period before January 1, 2004.

(Authority: 38 U.S.C. 103(d)(2)(B); Sec. 101, Pub. L. 108-183, 117 Stat. 2652)

CROSS REFERENCE: § 5.1, for the definition of "competent evidence" and § 5.1, for the definition of "fraud".

§ 5.204 [Reserved]

§ 5.205 Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.

(a) Void remarriage. The effective date of an award resumed because a surviving spouse's remarriage is void is the later of the following dates:

(1) The date the surviving spouse and the other person stopped living together; or

(2) The date VA receives a claim from the surviving spouse for resumption of benefits.

(b) Annulment. The effective date of an award resumed because a surviving spouse's remarriage is annulled is:

(1) The date the annulment became effective, if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date the annulment became effective.

(c) Divorce. The effective date of an award resumed because a surviving spouse's remarriage ends in divorce, provided the surviving spouse meets the requirements for reinstatement of § 5.203(d) or (e) is:

(1) The date the divorce became effective if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date the divorce became effective.

(d) Death. The effective date of an award resumed because a surviving spouse's remarriage ends due to a death, provided the surviving spouse meets the requirements of § 5.203(c) or (d) is:

(1) The date of death, if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date of death.

(Authority: 38 U.S.C. 5110(a), (k), (l))

§§ 5.206–5.219 [Reserved]

CHILD STATUS

§ 5.220 Status as a child for benefit purposes.

A person must meet the following criteria to be recognized as a child of the veteran for benefit purposes:

(a) Marital status. The person must be unmarried, except as provided in § 5.228.

(b) Age. The person must be under 18 years of age, unless either of the following is true:

(1) The person, before reaching 18 years of age, became permanently incapable of self-support because of physical or mental disability (see § 5.227); or

(2) The person is under 23 years of age and is pursuing a course of instruction at an educational institution approved by VA. For purposes of this section, the term educational institution means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria. The term includes schools, colleges, academies, seminaries, technical institutes, and universities. The term also includes home schools that operate in compliance with the compulsory attendance laws of the States in which they are located, whether treated as private schools or home schools under State law. The term home schools is limited to courses of instruction for grades kindergarten through 12.

(c) Relationship. The person must bear one of the following relationships to the veteran:

(1) Natural child. A natural child.

(2) Stepchild. A stepchild who became a stepchild under circumstances described in § 5.226.

(3) Adopted child. A person who was adopted by:

(i) The veteran's surviving spouse after the veteran's death under circumstances described in § 5.223;

(ii) The veteran before the person reached 18 years of age;

(iii) The veteran and became permanently incapable of self-support before reaching 18 years of age and was a member of the veteran's household at the time he or she became 18 years of age; or

(iv) The veteran before the person reached 23 years of age, and who is pursuing a course of instruction as described in paragraph (b)(2) of this section.

(d) Child enters active duty. A person who is a child of the veteran under paragraphs (a) through (c) of this section will not lose that status because the person enters active duty.

(Authority: 38 U.S.C. 101(4)(A), 104, 501(a))

CROSS REFERENCE: § 5.1, for the definition of "State". § 5.222, Evidence to establish an adopted child relationship.

§ 5.221 Evidence to establish a parent/natural child relationship.

(a) Parents married at date of child's birth. If additional evidence of relationship is required under § 5.181 and the parents were married to each other at the time of the

child's birth, a claimant or beneficiary may prove a parent/natural child relationship as follows:

(1) Mother. Any of the evidence described in § 5.229 that shows a mother/natural child relationship may be used to establish such a relationship.

(2) Father. Any of the evidence described in § 5.229 that shows a father/natural child relationship may be used to establish such a relationship. If the evidence does not show that the man married to the child's mother when the child was born is the child's father, or shows a different man may be the child's father, then VA will evaluate the facts, request any necessary evidence and information, and then make a determination concerning the child's paternity.

(b) Parents unmarried at date of child's birth. If additional evidence of relationship is required under § 5.181, and the parents were not married to each other at the time of the child's birth, a claimant or beneficiary may prove a parent/natural child relationship as follows:

(1) Mother. Any of the evidence described in § 5.229 that shows a mother/natural child relationship may be used to establish such a relationship.

(2) Father. In order to prove a father/natural child relationship, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will accept as additional supporting evidence the first of the following items that is obtainable; VA will not accept a lower item unless it is established that the items listed above it are unobtainable:

(i) A man's statement in writing and signed by him acknowledging himself as the natural father of the child;

(ii) Evidence showing that a specific man has been identified as the child's father by judicial decree; or

(iii) Other competent evidence showing that a child is the natural child of a specific man, including any of the following evidence:

(A) A copy of the public record of birth or a religious-context record documenting the birth of the child (such as a church record of baptism), showing that a specific man was the informant and was named as the father of the child;

(B) Statements from persons who know that a specific man accepted the child as his own; or

(C) Service department records or public records, such as records from schools or welfare agencies, showing that, with his knowledge, a specific man was named as the child's father.

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

CROSS REFERENCE: § 5.1, for the definition of "competent evidence".

§ 5.222 Evidence to establish an adopted child relationship.

This section states how to establish an adopted child relationship. A claimant or beneficiary cannot establish an adopted child relationship with a statement alone. See also § 5.220(c)(3). VA will require the first type of evidence listed in this section as

proof of this status, if obtainable. If this type of evidence is unobtainable, then the relationship may still be proven by the next type of obtainable evidence listed.

(a) A final adoption decree.

(b) A revised birth certificate showing the child as the child of the adopting parent in cases where release of adoption documents or information is prohibited or requires petition to a court, such as records sealed by a court.

(c) An interlocutory adoption decree, provided that the decree has not been rescinded or superseded and the child remains in the custody of the adopting parent during the interlocutory period.

(d) An adoption placement agreement between the adopting parent and an agency authorized by law to arrange adoptions. VA will recognize such an agreement for the duration of its term, provided that the adopting parent maintains custody of the child.

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

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.223 Child adopted after a veteran's death.

(a) Evidence. This section states how to establish that a surviving spouse adopted a child after a veteran's death. This section states the requirements to establish that a child a veteran's surviving spouse adopted after the veteran's death is the veteran's child. A surviving spouse cannot establish a veteran/adopted child relationship with a statement alone. In the absence of evidence to the contrary, VA will accept as true the statement of the surviving spouse or the custodian of the child that the requirements described in paragraphs (b)(2) and (3) of this section have been met.

(b) Circumstances under which adoption will be recognized. VA will recognize a person adopted by a veteran's surviving spouse as the veteran's child if the adoption met all of the following conditions:

(1) The adoption took place under a decree issued no later than 2 years after the date of the veteran's death;

(2) The person adopted was a member of the veteran's household at the time of the veteran's death; and

(3) At the time of the veteran's death the person adopted was not receiving regular contributions from any public or private welfare organization that furnishes services or assistance for children or from a person other than the veteran or the veteran's spouse that were sufficient to provide for the major portion of the child's support.

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

CROSS REFERENCE: § 5.1, for the definition of “custody of a child”.

§ 5.224 Child status despite adoption out of the veteran’s family.

(a) Retention of eligibility for benefits. The adoption of a veteran’s child out of the veteran's family, whether before or after the veteran's death, does not terminate that child’s status as the veteran’s child for purposes of eligibility for benefits.

(b) Evidence. Section 5.181(b) does not apply to establishing status as a child under this section.

(1) Establishing that a child was adopted out of the veteran’s family where release of adoption records is restricted or prohibited. If the jurisdiction in which a child was adopted out of the veteran’s family will release adoption documents only upon petition to a court, or the jurisdiction prohibits release of the documents or information, VA will accept the evidence listed in paragraph (b)(1)(i) of this section to establish the child’s status as the child of the veteran. If this evidence is unobtainable, then the relationship may still be proven by the evidence listed in (b)(1)(ii) of this section.

(i) 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;

(ii) A certified statement by the veteran, the veteran's surviving spouse, a person receiving an apportionment of benefits, or any of their fiduciaries setting forth the child's former name, the child’s 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.

(2) Evidence of child/natural parent relationship in apportionment cases. If VA receives a claim for an apportionment under § 5.772 for a child adopted out of a veteran's family, the evidence must be sufficient to establish the veteran as the natural parent of the child. See § 5.221.

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

CROSS REFERENCE: § 5.1, for the definition of "certified statement".

§ 5.225 Child status based on adoption into a veteran's family under foreign law.

(a) Scope—(1) Purpose. VA will apply this section to determine the validity of an adoption for benefit purposes when a person was adopted into a veteran's family under the laws of a foreign country.

(2) Foreign country. For purposes of this section, the term foreign country means any location except for a State, as that term is defined in § 5.1.

(3) Inclusion of certain Philippine veterans. For purposes of this section, the term "veteran" includes a Commonwealth Army veteran or new Philippine Scout under § 5.610.

(b) Living veteran—adopted person living in a foreign country—(1) Requirements for recognition of adoption. If the veteran is alive and the person adopted under the law of a foreign country lives in a foreign country, VA will recognize the person's adoption as valid if all of the following conditions are met:

(i) The person was under age 18 when adopted;

(ii) The veteran provides one-half or more of the person's support;

(iii) The person's natural parent does not have custody of the person unless the natural parent is also the veteran's spouse; and

(iv) The person lives with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing home, other institution, or other health-care facility.

(2) Continuing requirements. The person must continue to meet the requirements noted in paragraphs (b)(1)(ii) through (iv) of this section following the adoption. After the initial award of benefits to or for the child, VA may from time to time verify that the person continues to meet these requirements. A beneficiary's failure to provide verifying information or documents upon VA's request may result in suspension or discontinuance of payments until VA receives proof that the person still meets the requirements.

(c) Living veteran—adopted person not living in a foreign country. If the veteran is alive and the person adopted under foreign law does not live in a foreign country, VA will determine the validity of the adoption under §§ 5.220 and 5.222.

(d) Deceased veteran and surviving spouse adoptions—(1) Applicability. This paragraph (d) applies if a veteran adopted a person under the laws of a foreign country,

but the parent/child relationship was not established for VA purposes during the veteran's lifetime. This paragraph (d) also applies if a surviving spouse adopted a person under the laws of a foreign country after the veteran's death.

(2) Requirements for recognition of adoption. VA will recognize the person's adoption as valid if the veteran was entitled to and was receiving a VA dependent's allowance or similar VA monetary benefit for the person at any time during the 1 year before the veteran's death or if all of the following conditions are met:

(i) The person was under age 18 when adopted; and

(ii) All of the following conditions were met for at least 1 year before the veteran's death:

(A) The veteran provided one half or more of the person's support;

(B) The person's natural parent did not have custody of the person unless the natural parent is the veteran's surviving spouse; and

(C) The person lived with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing home, other institution, or other health-care facility.

(3) Additional requirements when the person was adopted by a surviving spouse after the veteran's death. If a surviving spouse adopts a person after the veteran's death, the adoption must also meet the requirements of § 5.223 for VA to recognize the person's adoption as valid.

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

CROSS REFERENCE: § 5.1, for the definition of “nursing home” and § 5.1, for the definition of “State”.

§ 5.226 Child status based on being a veteran’s stepchild.

(a) Definitions. The following definitions apply for purposes of this section:

(1) Stepchild means a natural or adopted child of a veteran’s spouse, but not of the veteran, including the child of a surviving spouse whose marriage to the veteran is deemed valid under § 5.200.

(2) Veteran/stepchild relationship, for purposes of this part, means a relationship between the veteran and the stepchild that meets the requirements of this section.

(b) Establishing a veteran/stepchild relationship. To establish a veteran/stepchild relationship all of the following conditions must be met:

(1) The stepchild is a member of the veteran’s household, as described in paragraph (c) of this section;

(2) The stepchild is related to the spouse of the veteran by birth or adoption; and

(3) The veteran is, or was at the time of his or her death, married to the natural or adoptive parent of the stepchild.

(c) Member of veteran's household. VA will consider a stepchild to be or to have been a member of the veteran's household if the conditions in one of the following paragraphs are met:

(1) The stepchild became the veteran's stepchild before reaching 18 years of age and is residing with the veteran or was residing with the veteran at the time of the veteran's death;

(2) The stepchild is pursuing a course of instruction as described in § 5.220(b)(2) who became the veteran's stepchild after reaching 18 years of age, but before reaching 23 years of age; and who is residing with the veteran or was residing with the veteran at the time of the veteran's death; or

(3) The stepchild receives, or at the time of the veteran's death was receiving, at least half of his or her support from the veteran. This includes a stepchild not residing with the veteran solely for medical, school, or similar reasons, and a stepchild who is residing with another person who has custody of the stepchild.

(d) Effect of termination of marriage or legal separation on stepchild relationship—(1) Termination of marriage after a veteran becomes entitled to benefits. If the marriage between a veteran and a stepchild's natural or adoptive parent ended, or they legally separated, after the date of the veteran's entitlement to benefits, then VA will no longer recognize the veteran/stepchild relationship unless:

(i) The stepchild continues to reside with the veteran; or

(ii) The veteran continues to provide at least half of the stepchild's support.

(2) Termination of marriage before a veteran becomes entitled to benefits. If the marriage between a veteran and a stepchild's natural or adoptive parent ended, or they legally separated, before the date of the veteran's entitlement to benefits, then VA will establish the stepchild as the veteran's child provided:

(i) The validity of the marriage can be proved; and

(ii) The stepchild continues to be a member of the veteran's household under paragraph (c) of this section after termination of the marriage.

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

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.227 Child status based on permanent incapacity for self-support.

(a) Scope. An unmarried person who has reached 18 years of age can be established as a child if the person was permanently incapable of self-support before reaching age 18. This section sets out the criteria VA uses to make this determination.

(b) Determining incapacity for self-support. The principal factors VA considers in determining whether a person is incapable of self-support are:

(1) Employment history—(i) Productive employment. A person who earns sufficient income for his or her reasonable support by his or her efforts is not incapable of self-support.

(ii) Intermittent employment. VA may find a person incapable of self support if incapacity for self-support is otherwise established under this section even though he or she has had employment that is only part of a tryout or that is casual, intermittent, unsuccessful, or terminated after a short period because of disability.

(iii) Charitable or therapeutic employment. VA will not find capacity for self-support based on employment that is afforded only upon sympathetic, therapeutic, or charitable considerations and that involves no actual or substantial provision of services.

(iv) Lack of employment. The fact that a person has never been employed tends to show incapacity for self-support if the lack of employment was due to the person's physical or mental disabilities and not due to unwillingness to work or other factors unrelated to the person's disability.

(2) Nature and extent of disability. (i) In cases where the person is not provided with sufficient income for his or her reasonable support by his or her efforts, VA will consider the following elements:

(A) Whether the nature and extent of disability would render the average person incapable of self-support;

(B) The impact of the disability on the person's ability to care for himself or herself and to perform the ordinary tasks expected of a person of the same age; and

(C) Whether the person attended school, and the highest grade completed.

(ii) Rating criteria applicable to a disabled veteran set out in the Schedule for Rating Disabilities in part 4 of this chapter are not controlling.

(c) Determining permanence of incapacity—(1) Principal factors. The principal factors for determining whether incapacity is permanent include, but are not limited to, the following:

(i) The nature and extent of disability;

(ii) Whether the disability has worsened or improved over time; and

(iii) Whether there is a reasonable possibility that the disability will improve in the future.

(2) Case-by-case determinations. VA determines permanence of incapacity for self-support on a case-by-case basis. Evidence to establish this may have originated before or after the child reached 18 years of age. Although other types of evidence will be accepted and considered, generally, the following types of evidence are particularly relevant to this issue:

(i) VA medical examinations or treatment records;

(ii) Private medical examination reports or treatment records;

(iii) Statements of persons having knowledge of the child's condition through personal observation, such as teachers, tutors, or social workers; or

(iv) Statements from representatives of institutions where the child received care, schooling, or other related services.

(d) Revision of child status determinations—(1) Certain protection provisions are inapplicable. A VA determination that a child is permanently incapable of self-support is not subject to protection under § 5.170(b), or § 5.173.

(2) Reexamination. Only in unusual cases will VA request reexamination after it has found that a child is permanently incapable of self-support.

(3) Intermittent employment. A child previously shown by competent evidence to have been permanently incapable of self-support before reaching 18 years of age may be held to remain so at a later date even though there may have been a short intervening period or periods of employment of the type described in paragraph (b)(1)(ii) of this section, provided the cause of the incapacity is the same as that upon which VA previously found permanent incapacity and there was no intervening injury or disease that could be considered a major factor in current incapacity.

(4) Court competency findings. If VA receives evidence that shows that a child formerly found by VA to have been permanently incapable of self-support before reaching 18 years of age based on mental incompetency has been found competent by a court, VA will determine whether the child continues to be permanently incapable of self-support under this section. Such court determinations are not binding upon VA.

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

CROSS REFERENCE: § 5.1, for the definition of "competent evidence".

§ 5.228 Exceptions applicable to termination of child status based on marriage of the child.

The marriage of a child generally terminates his or her child status for VA purposes, except in the following circumstances.

(a) Rule inapplicable to chapter 18 benefits. Marriage of a veteran's child does not disqualify him or her for benefits due to birth defects of a child of certain veterans under 38 U.S.C. chapter 18, Benefits for Children of Vietnam Veterans and Certain Other Veterans.

(b) Termination of marriage. A child's marriage will not prevent a child from receiving benefits or a beneficiary from receiving benefits for that child, if the child's marriage:

(1) Was void, under § 5.196;

(2) Was annulled by a court having authority to annul the marriage, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties;

(3) Ended by death before November 1, 1990; or

(4) Ended by divorce before November 1, 1990, by a court with authority to render the divorce decree, unless VA determines that the divorce was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 101(4), 103(e), 501(a), 1821, 1831; Sec. 9, Pub. L. 93-527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101-508, 104 Stat. 1388-343)

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.229 Proof of age or birth.

In order to prove age or birth, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will require the first type of evidence listed in this section as proof of age or birth, if obtainable. If this type of evidence is unobtainable, then age or birth may still be proven by the next type of obtainable evidence listed:

(a) A copy or abstract of the public record of birth (such as a birth certificate). A copy or abstract of the public record of birth established more than 4 years after the birth must be consistent with material on file with VA or must show on its face that it is based upon evidence that would be acceptable under this section.

(b) A copy of the public record of birth or a religious-context record documenting the birth of the child (such as a church record of baptism). An original or a copy of such a document created more than 4 years after the birth must be consistent with material on file with VA. The document must include at least one reference to age or relationship made when the reference was not essential to establishing entitlement to the benefit claimed.

(c) Service department records of birth.

(d) An affidavit or certified statement of the physician or midwife who was in attendance at birth.

(e) A copy of a Bible or other family record containing reference to the birth. The copy must be accompanied by a statement from a notary public, or other officer who has authority to administer oaths, certifying all the following criteria:

(1) The year the Bible or other book in which the record appears was printed;

(2) Whether it appears the record has been erased or changed in any way; and

(3) Whether it appears the entries were made on the date noted in the record.

(f) Affidavits or certified statements of two or more persons, preferably disinterested, who have knowledge of the name of the person born; the month, year, and place of birth of that person; and the parents' names. These persons must also provide VA with their own ages and an explanation as to how they came to know the facts surrounding the birth.

(g) Other reliable and convincing evidence that provides relevant information. This includes, but is not limited to:

(1) Census records;

(2) Hospital records;

(3) Insurance policies;

(4) School records;

(5) Employment records;

(6) Naturalization records; and

(7) Immigration records.

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

CROSS REFERENCE: § 5.1, for the definition of "certified statement".

EFFECTIVE DATES OF CHANGES IN CHILD STATUS

§ 5.230 Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.

(a) The effective date of an award, or an increased award, of pension or of dependency and indemnity compensation (DIC) to or for a child born after the parent/veteran's death is the date the child was born if VA receives either of the following types of evidence within the time specified:

(1) Proof of birth received no later than 1 year after the date of birth; or

(2) Notification of the expected or actual birth received no later than 1 year after the veteran's death, provided that the notice is sufficient to indicate an intent to claim pension or DIC benefits described in this section.

(b) If the evidence described in paragraph (a) of this section is received more than 1 year after the child's birth in the case of paragraph (a)(1) of this section or the veteran's death in the case of paragraph (a)(2) of this section, then the effective date of the award or increase is the first of the month after the month of receipt of the claim.

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

§ 5.231 Effective date of reduction or discontinuance: child reaches age 18 or 23.

A reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation because a person no longer qualifies as a child for benefit purposes based on age will be effective on the child's 18th or 23rd birthday, as applicable under § 5.220(b). For effective dates of reductions or discontinuance applicable when a child completes the course of education or otherwise discontinues school attendance before his or her 23rd birthday, see § 5.696.

(Authority: 38 U.S.C. 5112(a))

§ 5.232 Effective date of reduction or discontinuance: terminated adoptions.

A reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation because a person no longer qualifies as an adopted child under § 5.220(c)(3) or § 5.222, will be effective the earliest of the following dates:

(a) The day after the date the child left the custody of the adopting parent during the interlocutory period;

(b) The day after the date the child left the custody of the adopting parent during the term of an adoption placement agreement;

(c) The day after the date of rescission of the adoption decree; or

(d) The day after the date of termination of the adoption placement agreement.

(Authority: 38 U.S.C. 5112(a))

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.233 Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household.

If a reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation is because a person no longer qualifies as a stepchild under § 5.220(c)(2), because he or she is no longer a member of the veteran's household, the effective date of a reduction or discontinuance will be the day after the date the stepchild ceased being a member of the veteran's household.

(Authority: 38 U.S.C. 5112(a))

§ 5.234 Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.

(a) Applicability. This section provides the effective dates of:

(1) An award of pension, disability compensation, or dependency and indemnity compensation to or for a person who is a child for VA purposes under § 5.220(b)(1), because the person became permanently incapable of self-support before reaching age 18.

(2) A reduction, or a discontinuance of pension, disability compensation, or dependency and indemnity compensation to or for a person who is a child for VA purposes under § 5.220(b)(1), because the person is no longer permanently incapable of self-support.

(b) Awards The effective dates for benefits based upon a child's permanent incapacity for self-support, to or for a child after the child reaches 18 years of age are as follows:

(1) Initial awards. The effective dates of initial awards are governed by applicable effective date rules under § 5.183.

(2) Claim for continuation of benefits. (i) If VA receives a claim for the continuation of the benefits no later than 1 year after the child's 18th birthday, then the effective date of a continuation is the date of the child's 18th birthday.

(ii) If VA receives a claim for the continuation of the benefits more than 1 year after the child's 18th birthday, then the effective date of a continuation is the date VA receives a claim for benefits.

(c) Reduction or discontinuance of benefits—(1) Pension benefits. If VA reduces or discontinues pension benefits because the child is no longer incapable of self-support, the effective date will be the first day of the month after the month VA last paid benefits.

(2) Disability compensation or dependency and indemnity compensation benefits. If VA reduces or discontinues disability compensation or dependency and indemnity compensation because the child is no longer incapable of self-support the effective date will be the first day of the month after the expiration of the 60-day notice period described in § 5.83.

(Authority: 38 U.S.C. 5110, 5112)

§ 5.235 Effective date of an award of benefits due to termination of a child's marriage.

(a) Applicability. This section states the effective dates of awards to or for a child when status as a child has been restored due to termination of the child's marriage under § 5.228.

(b) Effective date—(1) Void marriages. If a child's marriage is void, the award of benefits is effective the later of the following dates:

(i) The date the child and the other person stopped living together; or

(ii) The date VA receives a claim for benefits.

(2) Annulled marriages. If a child's marriage is annulled, the award of benefits is effective:

(i) The date the annulment decree became final, if VA receives a claim for benefits no later than 1 year after that date; or, if not,

(ii) The date VA receives a claim for benefits.

(3) Marriage terminated by death or divorce before November 1, 1990. Awards under § 5.228(b)(3) or (4) (pertaining to marriages terminated by death or divorce before November 1, 1990) are effective on the date VA receives a claim for benefits.

(Authority: 38 U.S.C. 501(a), 5110(a), (k), (l); Sec. 9, Pub. L. 93-527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101-508, 104 Stat. 1388)

§§ 5.236–5.237 [Reserved]

PARENT STATUS

§ 5.238 Status as a veteran's parent.

(a) Person who qualifies as a veteran's parent for VA purposes. Except as otherwise provided in this section, a parent of a veteran is one of the following persons:

(1) A veteran's natural mother or father;

(2) A veteran's mother or father through adoption; or

(3) A person who stands in the relationship of a parent to a veteran, subject to the following requirements:

(i) The person stood in the relationship of a parent to the veteran for no less than 1 year at any time before the veteran's entry into active military service; and

(ii) The relationship began before the veteran's 21st birthday, although it may have ended at any time.

(b) Institutions do not qualify. VA will not recognize an institution as a veteran's parent, even if the institution is providing care for the veteran in place of a parent.

(c) Abandonment. VA will not provide benefits to a person based on that person's status as a veteran's natural or adoptive parent if that person abandoned the veteran, unless that person subsequently assumed the legal and moral obligations of a parent with respect to the veteran. For purposes of this section, abandoned means that a veteran's natural or adoptive parent did not assume the legal and moral obligations of a parent with respect to the veteran. Abandonment entails not just a failure to provide support, but a refusal to do so. It is not necessary to show that someone else assumed the parental relationship for abandonment to occur.

(d) Not more than one mother and one father recognized—(1) General rule. VA will recognize not more than one father and not more than one mother as parents of a veteran.

(2) Different persons qualified as a veteran's mother or father at different times.

(i) If two or more persons qualified as a veteran's mother or father under this section at different times, VA will recognize the person who last qualified before the veteran's last entry into active military service.

(ii) VA will recognize a veteran's natural parent as the mother or father of the veteran, if he or she was the last person to have a parental relationship with the veteran before the veteran last entered active military service. This is true even if that parent's parental rights have been terminated by a court.

(e) A person claims status as a veteran's mother or father under paragraph (a)(3) of this section while the veteran's natural or adoptive mother or father is still living.

Unless the natural or adoptive mother or father relinquished parental control of the veteran, VA will not recognize a person identified in paragraph (a)(3) of this section as the veteran's mother or father if the natural or adoptive mother or father was living during the period the person claims to have stood in the relationship of a mother or father to the veteran. For purposes of this paragraph (e), relinquished parental control means that a veteran's natural or adoptive parent ceased to provide for the child and that the parent and child relationship was broken. Relinquishment of parental control does not necessarily mean abandonment by the parent. However, a finding of abandonment would automatically establish relinquishment of control. It is not necessary to have had a court terminate parental rights.

(Authority: 38 U.S.C. 101(5), 501(a))

§ 5.239 [Reserved]

Subpart E—Claims for Service Connection and Disability Compensation

§ 5.240 Disability compensation.

(a) Definition. Disability compensation means a monthly payment VA makes to a veteran for a service-connected disability, as described in § 5.241, or for a disability compensated as if it were service connected, under § 5.350.

(b) Additional disability compensation based on having dependents. Additional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation based on a single or a combined disability rating of 30 percent or more. The additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114.

(Authority: 38 U.S.C. 101(13), 1110, 1114, 1115, 1131, 1135, 1151)

§ 5.241 Service-connected disability.

A service-connected disability is a current disability as to which any of the following is true:

(a) The disability was caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service. See §§ 5.260 through 5.269 (concerning presumptions of service connection).

(b) The disability was caused by a preservice injury or disease aggravated, or presumed to have been aggravated, in the line of duty during active military service. See § 5.245.

(c) The disability is secondary to a service-connected disability, pursuant to §§ 5.246 through 5.248 (governing awards of secondary service connection).

(Authority: 38 U.S.C. 1110, 1112, 1116, 1117, 1118, 1131, 1133, 1137)

§ 5.242 General principles of service connection.

When a veteran seeks service connection:

(a) VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran's service as shown by the veteran's service record, the official history of each organization in which the veteran served, the veteran's medical records, and all pertinent medical and lay evidence; and

(b) VA will not consider a statement that a veteran signed during service that:

(i) Pertains to the origin, incurrence, or aggravation of an injury or disease; and

(ii) Was against the veteran's interest at the time he or she signed it.

(Authority: 10 U.S.C. 1219; 38 U.S.C. 1154(a))

§ 5.243 Establishing service connection.

(a) Requirements. Except as provided in §§ 5.246 and 5.247, and paragraph (c) of this section, proof of the following elements is required to establish service connection:

(1) A current disability;

(2) Incurrence or aggravation of an injury or disease in active military service; and

(3) A causal link between the injury or disease incurred in, or aggravated by, active military service and the current disability.

NOTE 1 TO PARAGRAPH (a): Permanent disability shown in service. VA will consider all three elements of paragraph (a) of this section proven if service records establish that an injury or disease incurred in or aggravated by active military service produced a disability that is clearly permanent by its nature, such as the amputation of a limb or the anatomical loss of an organ.

NOTE 2 TO PARAGRAPH (a): Chronic disease or chronic residual of an injury in temporary remission. VA will not deny service connection for lack of a current disability solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. Examples of chronic diseases and chronic residuals of injury subject to

temporary remission include chronic tinnitus, malaria, mental illness, skin disease, and intervertebral disc syndrome.

(b) Time of diagnosis is not necessarily controlling. Proof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service.

(c) Residuals of chronic diseases—(1) General rule. VA will grant service connection for a current disability not clearly due to an intercurrent cause if the current disability is caused by a chronic disease and competent evidence establishes that the veteran had the same chronic disease in service or within an applicable presumptive period.

(2) Definition of chronic disease. For purposes of this paragraph (c), a chronic disease means a disease listed in § 5.261(c).

NOTE TO PARAGRAPH (c)(2): Proof that a disease was chronic in service requires a combination of manifestations in service sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis in service including the word “chronic.” See also § 5.260(c). Isolated findings in service, such as joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, would not alone establish the presence in service of a chronic disease, such as arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity at some later date.

(3) Continuity of signs or symptoms. Signs or symptoms noted in service, or during an applicable presumptive period, may prove the existence of an a chronic disease when all of the following are shown by competent evidence:

(i) The veteran had signs or symptoms of a chronic disease during active military service or during an applicable presumptive;

(ii) The signs or symptoms continued from the time of discharge or release from active military service, or from the end of an applicable presumptive period until the present; and

(iii) The signs or symptoms currently demonstrated are signs or symptoms of a chronic disease.

(Authority: 38 U.S.C. 101(16), 501(a), 1110, 1131)

§ 5.244 Presumption of sound condition on entry into military service.

(a) Presumption of sound condition. VA will presume that a veteran was in sound condition upon entry into active military service, which means that the veteran was free from injury or disease, except as noted in the report of a medical examination conducted for entry into active military service.

(b) Medical history recorded in entry examination reports—(1) Medical histories. The presumption of sound condition applies if an examiner recorded a history of injury or disease in an entry examination report, but the examiner did not report any

contemporaneous clinical findings related to such injury or disease. VA may consider the notation of history together with other evidence in determining whether the presumption of sound condition is rebutted under paragraph (e) of this section.

(2) Medical examination reports. The presumption of sound condition is rebuttable under paragraph (d) of this section even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.

(c) Rebutting the presumption.

(1) For veterans with any wartime service and for veterans with peacetime service after December 31, 1946, VA can rebut the presumption only with clear and unmistakable evidence that the injury or disease resulting in the disability for which the veteran claims service connection both:

(i) Preexisted service; and

(ii) Was not aggravated by service, which means that during service there was no increase in disability due to the preexisting injury or disease, or that any such increase was due to the natural progress of the disease.

(2) To determine whether there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, see § 5.245(b).

(3) If there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, to

determine whether the increase was due to the natural progress of the disease, see § 5.245(c).

(d) Medical principles regarding preexisting conditions. 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. If 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.) are shown during service but there is no evidence of the relevant antecedent active disease or injury during service, that is satisfactory proof that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close to such date that the disease could not have originated in so short a period, will be satisfactory proof that they existed preservice. VA will consider conditions of an infectious nature with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, VA will consider them to have preexisted service. VA will consider the following to have existed preservice:

(1) Personality disorders if they are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior;

(2) Chronic psychoneurosis of long duration; or

(3) Other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis. (Authority: 38 U.S.C. 1110, 1111, 1131, 1137)

§ 5.245 Service connection based on aggravation of preservice injury or disease.

(a) Presumption of aggravation. When an injury or disease was noted in the report of examination for entry into active military service, VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability during service (or during any applicable presumptive period) resulting from the injury or disease.

(b) Determining whether disability increased during service—(1) Increase in severity. For purposes of this section, increase in disability during active military service means the disability resulting from the preexisting injury or disease permanently became more severe during service (or during any applicable presumptive period) than it was before active military service.

(2) Temporary flare-ups. Except as provided in paragraph (b)(4) of this section, temporary or intermittent flare-ups of signs or symptoms of a preexisting injury or disease do not constitute aggravation in service unless the underlying condition worsened, resulting in increased disability.

(3) Effects of medical or surgical treatment. The usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase

in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

(4) Combat or prisoner-of-war service. The development of signs or symptoms, whether temporary or permanent, of a preexisting injury or disease during or proximately following combat with the enemy, as defined in § 5.249(a)(2), or following status as a prisoner of war will establish aggravation of the disability resulting from that preexisting injury or disease.

(c) Rebutting the presumption—natural progress of a disease. The presumption of aggravation is rebutted if VA specifically finds by clear and unmistakable evidence that the increase in the severity of disability during service (or during an applicable presumptive period) was normal for the disease, that is, active military service did not contribute to the increase.

(Authority: 38 U.S.C. 1153, 1154)

§ 5.246 Secondary service connection—disability that is due to or the result of service-connected disability.

Except as provided in § 5.365(a), VA will grant service connection for a disability that is due to or the result of a service-connected disability.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.

VA will grant service connection for any increase in severity of a nonservice-connected disability if the increase was due to or the result of a service-connected disability, and the increase was not due to the natural progress of the nonservice-connected disease. However, VA cannot grant service connection under this section without medical evidence establishing the severity of the nonservice-connected disability before or contemporaneous with the increase in severity due to the service-connected disability. The agency of original jurisdiction (AOJ) will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the severity level of the nonservice-connected disability prior to the increase in severity, any increase in severity due to the natural progress of the disease, and the current severity level of the disability. The AOJ will then determine the amount of aggravation by subtracting the rating prior to aggravation and any increase in severity due to the natural progress of the disease from the current severity level. The result will be the increase due to or the result of a service-connected disability. VA will grant service connection only for that increase.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.

VA will grant secondary service connection for ischemic heart disease or other cardiovascular disease that develops after a veteran 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.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.249 Special service connection rules for combat-related injury or disease.

(a) Combat-related incurrence or aggravation of injury or disease shown by lay or other evidence. (1) VA will accept that an injury or disease was incurred or aggravated in service if a veteran engaged in combat with the enemy during a period of war, campaign, or expedition, and there is satisfactory lay or other evidence that the injury or disease was incurred in or was aggravated by such combat. Lay evidence may include a veteran's description of an event, disease, or injury. VA will accept such evidence as sufficient proof of incurrence or aggravation in service of an injury or disease even though there is no official record of the incurrence or aggravation. The evidence must be consistent with the circumstances, conditions, or hardships of the veteran's combat with the enemy. Incurrence or aggravation established under this paragraph (a) may be rebutted by clear and convincing evidence to the contrary.

(2) Combat with the enemy means personal participation in an actual fight or encounter with a military foe, hostile unit, or instrument or weapon of war. It includes presence during such events as a combatant or while performing a duty in support of combatants, such as providing medical care to the wounded.

(b) Decorations as evidence of combat. When a veteran has received any of the combat decorations listed below, VA will presume that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary:

(1) Air Force Cross

(2) Air Medal with “V” Device

(3) Army Commendation Medal with “V” Device

(4) Bronze Star Medal with “V” Device

(5) Combat Action Ribbon

(6) Combat Infantryman Badge

(7) Combat Medical Badge

(8) Combat Aircrew Insignia

(9) Distinguished Service Cross

(10) Joint Service Commendation Medal with “V” Device

(11) Medal of Honor

(12) Navy Commendation Medal with “V” Device

(13) Navy Cross

(14) Purple Heart

(15) Silver Star

(16) Combat Action Badge

(17) Any other form of decoration that the Secretary concerned may designate for award exclusively to persons for actions performed while engaged in combat with the enemy.

(Authority: 38 U.S.C. 501(a), 1154(b))

CROSS REFERENCE: §§ 5.141 (evidence in claims of former prisoners of war), 5.245(b)(4), Service connection based on aggravation of preservice injury or disease, and 5.250(b)(2), Service connection for posttraumatic stress disorder.

§ 5.250 Service connection for posttraumatic stress disorder.

(a) Service connection for posttraumatic stress disorder (PTSD). Service connection for PTSD requires:

(1) Medical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter;

(2) A link, established by medical evidence, between current signs or symptoms and an in-service stressor; and

(3) Except as provided in paragraphs (c), (d), and (e) of this section, credible supporting evidence that the claimed in-service stressor occurred. For purposes of this section, credible supporting evidence means credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.

(b) VA will not deny a claim without trying to verify the claimed stressor. If the existence of the claimed stressor is not verified by credible evidence, VA will seek verification from the appropriate service department or other entity. The exception to this rule is when, upon VA's request, the claimant fails to provide the information

needed by the appropriate service department or other entity to try to verify the claimed stressor.

(c) Special rule for veterans diagnosed with PTSD during active military service. If the evidence establishes a diagnosis of PTSD during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's active military service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(d) Special rules for veterans who engaged in combat with the enemy or who were prisoners of war. To determine if a stressor occurred during combat with the enemy or while a prisoner of war, VA will apply the rules in § 5.249 or § 5.141.

(e)(1) Adequacy of the stressor confirmed by VA psychiatrist or psychologist. In the absence of clear and convincing evidence to the contrary, and provided the claimed in-service stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the stressor if:

(i) The stressor is related to the veteran's fear of hostile military or terrorist activity; and

(ii) A VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the stressor is adequate to support a diagnosis of

posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor.

(2) For purposes of this paragraph (e), fear of hostile military or terrorist activity means:

(i) That a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as:

(A) From an actual or potential improvised explosive device;

(B) Vehicle-imbedded explosive device;

(C) Incoming artillery, rocket, or mortar fire;

(D) Grenade;

(E) Small arms fire, including suspected sniper fire; or

(F) Attack upon friendly military aircraft, and

(ii) The veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(f) Special rules for establishing a stressor based on personal assault. (1) VA will not deny a PTSD claim that is based on in-service personal assault without:

(i) Advising the veteran that evidence from sources other than the veteran's service records, including evidence described in paragraph (c)(2) of this section, may constitute credible supporting evidence of the stressor; and

(ii) Providing the veteran with an opportunity to furnish this type of evidence or advise VA of potential sources of such evidence.

(2) Evidence that may establish a stressor based on in-service personal assault includes, but is not limited to, the following:

(i) Records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians;

(ii) Pregnancy tests or tests for sexually transmitted diseases;

(iii) Statements from family members, roommates, fellow servicemembers, or clergy; or

(iv) Evidence of behavioral changes following the claimed assault (which may be shown in any of the following sources), including: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes.

(3) VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

(Authority: 38 U.S.C. 501(a), 1110, 1131, 1154)

§ 5.251 Current disabilities for which VA cannot grant service connection.

(a) General rule. VA will not grant service connection for the following disabilities because they are not the result of an injury or disease for purposes of service connection:

(1) Congenital or developmental defects (such as congenital or developmental refractive error of the eye);

(2) Developmental personality disorders; or

(3) Developmental intellectual disability (mental retardation).

(b) Distinguishable disabilities. VA will grant service connection for the following disabilities, which are scientifically distinguishable from those listed in paragraph (a) of this section and actually result from an injury or disease:

(1) Malignant or pernicious myopia;

(2) Personality change (as distinguished from personality disorder) as part of, or due to or the result of, an organic mental disorder or a service-connected general medical condition (such as psychomotor epilepsy), or due to injury. See § 5.246.

(3) Nondevelopmental intellectual disability as part of, or due to or the result of, a service-connected disability. See § 5.246.

(c) Superimposed disabilities. Paragraph (a) of this section does not preclude granting service connection for a disability that is superimposed on a disability listed in paragraph (a) of this section.

(d) Hereditary diseases. Paragraph (a)(1) of this section does not preclude granting service connection for disability due to an inherited or familial disease (as distinguished from congenital or developmental defects in paragraph (a)(1) of this

section). See § 5.261(e) regarding presumptions related to certain inherited or familial diseases.

(e) Diseases of allergic etiology. Paragraph (a) of this section does not preclude granting service connection for disability due to diseases of allergic etiology, including, but not limited to, bronchial asthma and urticaria.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§§ 5.252–5.259 [Reserved]

PRESUMPTIONS OF SERVICE CONNECTION FOR CERTAIN DISEASES, DISABILITIES, AND RELATED MATTERS

§ 5.260 General rules governing presumptions of service connection.

(a) The purpose of presumptions of service connection. Presumptions of service connection apply when the evidence would not warrant service connection without their aid. A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts). Examples of material facts include onset of a disease or exposure to certain herbicide agents during a veteran's military service. The evidence must prove that the presumption applies to the claimant, but after such a showing there is no need for additional evidence of the material fact(s) established by

the presumption. Presumptions of service connection are set forth in §§ 5.261 through 5.268 and § 5.270. The general rules in this section apply to those sections, except as otherwise provided. VA will not use the existence of a presumptive period to deny service connection for a presumptive disease diagnosed after the presumptive period if direct evidence shows it was incurred or aggravated during service.

(b) Presumptive period. (1) Definition. Certain presumptions apply only when a disease becomes manifest to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter) within a prescribed time period, called the "presumptive period." This does not mean that the disease must have actually been diagnosed during that period. A presumption of service connection applies when the evidence shows there were symptoms during the presumptive period sufficient to support a finding that a disease diagnosed after the presumptive period was actually disabling to the required degree during the presumptive period. This includes instances where the principles of continuity of signs or symptoms in § 5.243(d) establish a link between symptoms during the presumptive period and a subsequent diagnosis. It also includes instances where manifestations during the presumptive period are followed within a reasonable time by a diagnosis. What constitutes a reasonable time depends on the nature and course of the disease and any other relevant factors. Simply because a disease is far advanced when diagnosed does not mean that it was at least 10 percent disabling during the presumptive period. Evidence is still required that the claimed disability was at least 10 percent disabling during the presumptive period.

(2) Lay and medical evidence. Whether a disease became manifest during a presumptive period may be established by competent medical evidence, competent lay evidence, or both. Competent medical evidence should set forth the signs or symptoms shown by an examination performed during the presumptive period. Competent lay evidence should describe the material and relevant facts as to the veteran's disability observed during the presumptive period, not merely conclusions based upon opinion.

(c) Rebutting a presumption of service connection. (1) Presumption rebutted by affirmative evidence. VA cannot grant service connection under §§ 5.261 through 5.268, § 5.270 or § 5.271, when the presumption has been rebutted by affirmative evidence (as defined in paragraph (c)(2) of this section) that is competent to indicate the onset or existence of a disease, injury, or disability, such as affirmative evidence that establishes that:

(i) An intervening or nonservice-related injury or disease caused the injury, disease, or disability;

(ii) The veteran's willful misconduct caused the injury, disease, or disability (see § 5.661);

(iii) The injury or disease was not incurred in service or, in the case of a preexisting condition, was not aggravated during service; or

(iv) A cancer (for which service connection is claimed under § 5.262 or § 5.268) originated in another area of the body and then spread to one of the specific areas listed in § 5.262(e) or § 5.268(b).

(2) Definition. Affirmative evidence means evidence that supports the existence of a particular fact, and does not mean the mere absence of evidence. However, the absence of evidence may be a basis for affirmative evidence. For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of signs or symptoms of the condition before that time.

(Authority: 38 U.S.C. 501(a), 1112, 1113, 1137)

CROSS REFERENCE: § 5.1, for the definition of "competent lay evidence" and "willful misconduct".

§ 5.261 Certain chronic diseases VA presumes are service connected.

(a) Eligibility. VA will presume a disease listed in paragraph (c) of this section was incurred or aggravated in service, if it first became manifest to a degree of 10 percent or more disabling:

(1) No later than 1 year after separation from a qualifying period of service; or

(2) No later than such other time after a qualifying period of service as provided in paragraph (d) of this section.

(b) Qualifying period of service. A qualifying period of service is:

(1) A period of 90 days or more of active, continuous service that began before December 31, 1946, and included service during a period of war; or

(2) Any period of 90 days or more of active, continuous service after December 31, 1946.

(c) Diseases presumed service connected. VA will grant service connection on a presumptive basis for any chronic disease listed in this paragraph (c) where a disease becomes manifest to a degree of disability of 10 percent or more during the applicable presumptive period for the disease. For purposes of this section, VA will consider the diseases listed in the table at the end of paragraph (d) of this section to be chronic because of slow onset and persistent progress, even if they are initially diagnosed as acute. Unless the clinical picture is clear otherwise, VA will consider whether an acute condition is an exacerbation of a chronic disease. VA cannot apply the presumption of service connection when the evidence shows that the disease existed prior to military service to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter). However, VA will apply the presumption where there is evidence that the disease existed prior to entry into service to a degree of less than 10 percent disabling. Only conditions listed in this section are chronic for purposes of this section.

Disease:	**Disease must manifest to a degree of 10 percent or more disabling no later than this period after:** • **Either discharge or release from service under paragraph (a) of this section; or** • **The end of the war period under paragraph (c) of this section.**
Anemia, primary.	1 year
Arteriosclerosis.	1 year

Arthritis.	1 year
Atrophy, progressive muscular.	1 year
Brain hemorrhage.	1 year
Brain thrombosis.	1 year
Bronchiectasis.	1 year
Calculi of the kidney, bladder, or gallbladder.	1 year
Cardiovascular-renal disease, including, but not limited to, hypertension. See paragraph (e) of this section.	1 year
Cirrhosis of the liver.	1 year
Coccidioidomycosis.	1 year
Diabetes mellitus.	1 year
Encephalitis lethargica residuals.	1 year
Endocarditis (this term covers all forms of valvular heart disease).	1 year
Endocrinopathies.	1 year
Epilepsies.	1 year
Hansen's disease.	3 years
Hodgkin's disease.	1 year
Leukemia (acute or chronic).	1 year
Lupus erythematosus, systemic.	1 year
Multiple sclerosis.	7 years
Myasthenia gravis.	1 year
Myelitis.	1 year
Myocarditis.	1 year
Nephritis.	1 year
Organic diseases of the nervous system.	1 year
Osteitis deformans (Paget's disease).	1 year
Osteomalacia.	1 year
Palsy, bulbar.	1 year
Paralysis agitans.	1 year
Psychoses	1 year
Purpura idiopathic, hemorrhagic.	1 year
Raynaud's disease.	1 year
Sarcoidosis.	1 year
Scleroderma.	1 year
Sclerosis, amyotrophic lateral.	1 year
Syringomyelia.	1 year
Thromboangiitis obliterans (Buerger's disease).	1 year
Tuberculosis, active (see § 5.341,Presumption of service connection for disease; wartime and	3 years

service after December 31, 1946).	
Tumors, malignant.	1 year
Tumors, of the brain or spinal cord or peripheral nerves.	1 year
Ulcers, peptic (gastric or duodenal).	1 year

(d) Cardiovascular-renal disease, including, but not limited to, hypertension. The term "cardiovascular-renal disease" applies to combination involvement of arteriosclerosis, nephritis, and organic heart disease. VA will consider hypertension which was 10 percent or more disabling during the 1-year presumptive period as a chronic disease.

(e) Hereditary disease. For purposes of granting service connection for a chronic disease on a presumptive basis, VA will presume that an inherited or familial disease listed in paragraph (d) of this section was incurred in or aggravated by service, if the disease first became manifest to a degree of 10 percent or more disabling during the applicable presumptive period following discharge or release from active military service.

(Authority: 38 U.S.C. 501(a), 1101(3), 1112(a), 1137)

§ 5.262 Presumption of service connection for diseases associated with exposure to certain herbicide agents.

(a) General rules.—(1) Presumption of exposure. (i) Vietnam. VA will presume that a veteran who, during active military service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, was

exposed to an herbicide agent. VA will presume that the last date on which such a veteran was exposed to an herbicide agent is the last date on which that veteran served in the Republic of Vietnam during that period. For purposes of this section, "Service in the Republic of Vietnam" includes only service on land, or on an inland waterway, in the Republic of Vietnam.

(ii) Korea. VA will presume that a veteran who, during active military service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, was 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.

(2) Presumption of service connection. Where a veteran who was exposed to an herbicide agent during active military service is diagnosed with a disease listed in paragraph (e) of this section that becomes manifest to a degree of 10 percent or more disabling during the period described in paragraph (e) of this section, VA will presume that the disease was incurred in or aggravated by service.

(b) Definition of herbicide agent. For purposes of this section, the term herbicide agent means 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; or picloram.

(c) No minimum period of service required. Any period of active military service involving presumed or established exposure to an herbicide agent is sufficient for

purpose of establishing presumptive service connection of a specified disease under this section.

(d) Rebutting the presumption of exposure. The presumption of exposure applies unless affirmative evidence establishes that the veteran was not exposed to an herbicide agent during active military service.

(e) Diseases presumed service connected. The following table lists the diseases that VA will presume to be service connected based on this section. VA will not apply the presumption of service connection where the evidence shows that the disease existed prior to active military service to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter). VA will apply the presumption where there is evidence that the disease existed prior to entry into such service to a degree of less than 10 percent disabling.

Disease:	**Disease must manifest to a degree of 10 percent or more disabling:**
AL Amyloidosis	any time after exposure
Chloracne or other acneform disease consistent with chloracne.	no later than 1 year after the last day of exposure
All chronic B-cell leukemias (including, but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia).	any time after exposure
Hodgkin's disease.	any time after exposure
Multiple myeloma.	any time after exposure
Non-Hodgkin's lymphoma.	any time after exposure
Early-onset peripheral neuropathy.	no later than 1 year after the last day of exposure
Porphyria cutanea tarda.	no later than 1 year after the last day of exposure
Prostate cancer.	any time after exposure
Respiratory cancers (cancer of the	any time after exposure

lung, bronchus, larynx, or trachea).	
Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma).[1]	any time after exposure
Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes).	any time after exposure
Ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina)[2]	any time after exposure
Parkinson's disease	any time after exposure

\1\ The term "soft-tissue sarcoma" includes the following diseases:
Adult fibrosarcoma.
Alveolar soft part sarcoma.
Angiosarcoma (hemangiosarcoma and lymphangiosarcoma).
Clear cell sarcoma of tendons and aponeuroses.
Congenital and infantile fibrosarcoma.
Dermatofibrosarcoma protuberans.
Ectomesenchymoma.
Epithelioid leiomyosarcoma (malignant leiomyoblastoma).
Epithelioid sarcoma.
Extraskeletal Ewing's sarcoma.
Leiomyosarcoma.
Liposarcoma.
Malignant fibrous histiocytoma.
Malignant ganglioneuroma.
Malignant giant cell tumor of tendon sheath.
Malignant glomus tumor.
Malignant granular cell tumor.
Malignant hemangiopericytoma.
Malignant mesenchymoma.
Malignant schwannoma, including, but not limited to, malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas.
Proliferating (systemic) angioendotheliomatosis.
Rhabdomyosarcoma.
Synovial sarcoma (malignant synovioma).

\2\ For purposes of this section, the term ischemic heart disease does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease or stroke, or any other condition that does not qualify within the generally accepted medical definition of ischemic heart disease.

(Authority: 38 U.S.C. 501(a), 1116)

§ 5.263 Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.

(a) Service in Vietnam. For purposes of this section, “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(a))

§ 5.264 Diseases VA presumes are service connected in a former prisoner of war.

(a) Eligibility. Any period of active military service is sufficient for establishing presumptive service connection for a disease specified in this section. The requirements for the length of internment as a prisoner of war (POW) are stated in paragraphs (b) and (c) of this section. A veteran is eligible for the presumption if the veteran:

(1) Is a former POW under § 5.140; and

(2) Is diagnosed as having a disease listed in paragraph (b) or (c) of this section that first became manifest to a degree of 10 percent or more disabling at any time after discharge or release from active military service, even if there is no record of such disease during such service.

(b) Diseases presumed service connected following internment of any duration. VA will presume the following diseases were incurred in or aggravated by service if the criteria of paragraph (a) of this section are met:

(1) Any of the anxiety disorders as listed in § 4.130 of this chapter, including, but not limited to, posttraumatic stress disorder (PTSD);

(2) Atherosclerotic heart disease or hypertensive vascular disease (including, but not limited to, hypertensive heart disease) and their complications (including, but not limited to, myocardial infarction, congestive heart failure, and arrhythmia);

(3) Dysthymic disorder (or depressive neurosis);

(4) Organic residuals of frostbite, if the Secretary determines that the veteran was detained or interned in climatic conditions consistent with the occurrence of frostbite;

(5) Osteoporosis if the Secretary determines that the veteran has PTSD;

(6) Post-traumatic osteoarthritis;

(7) Psychosis; and

(8) Stroke and its complications.

(c) Presumption of service connection for 30 days or more of internment. VA will presume the following diseases were incurred in or aggravated by service if the veteran was interned for 30 days or more and the criteria of paragraph (a) of this section are met:

(1) Beriberi;

(2) Beriberi heart disease, including ischemic heart disease if localized edema experienced during captivity;

(3) Chronic dysentery;

(4) Cirrhosis of the liver;

(5) Helminthiasis;

(6) Irritable bowel syndrome;

(7) Nutritional deficiency, including, but not limited to, avitaminosis and malnutrition;

(8) Optic atrophy associated with malnutrition;

(9) Osteoporosis;

(10) Pellagra;

(11) Peptic ulcer disease; and

(12) Peripheral neuropathy except where directly related to infectious causes.

(Authority: 38 U.S.C. 501(a), 1112(b))

CROSS REFERENCE: § 5.1, for the definition of “psychosis”. § 5.140, Determining former prisoner of war status, for the definition of “former prisoner of war”.

§ 5.265 Tropical diseases VA presumes are service connected.

(a) Eligibility. VA will presume any disease listed in paragraph (d) of this section was incurred in or aggravated by service if it first became manifest to a degree of 10 percent or more disabling:

(1) No later than 1 year after separation from a qualifying period of service; or

(2) Within a period that indicates (based on accepted medical literature) that the incubation period began during a qualifying period of service.

(b) Qualifying period of service. For purposes of this section, "a qualifying period of service" is:

(1) A period of 90 days or more of continuous active military service that began before December 31, 1946, and included service during a period of war; or

(2) Any period of 90 days or more continuous active military service after December 31, 1946.

(c) Claims based on service ending before December 7, 1941. In claims based on service ending before December 7, 1941, for purpose of determining whether a tropical disease manifested within a presumptive period under 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.

(d) Tropical diseases presumed service connected. VA will presume that the following diseases were incurred in or aggravated by service if the criteria of paragraphs (a) through (c) of this section are met:

(1) Amebiasis;

(2) Blackwater fever;

(3) Cholera;

(4) Dracontiasis;

(5) Dysentery;

(6) Filariasis;

(7) Leishmaniasis, including, but not limited to, kala-azar;

(8) Loiasis;

(9) Malaria;

(10) Onchocerciasis;

(11) Oroya fever;

(12) Pinta;

(13) Plague;

(14) Schistosomiasis;

(15) Yaws; and

(16) Yellow fever.

(e) Rebuttal of presumption. Lack of active military service in a locality with a high incidence of the disease may be considered evidence to rebut the presumption. Post-service residence during the applicable presumptive period in a region where the

particular disease is endemic may also be considered evidence to rebut the presumption. VA will consider the known incubation periods of tropical diseases in determining whether the presumption of service connection has been rebutted.

(Authority: 38 U.S.C. 1101(4), 1112(a)(2), 1137).

(f) Claims for service connection of tropical diseases based on peacetime service before January 1, 1947. This paragraph (f) applies to a veteran with peacetime service before January 1, 1947, who served 6 months or more. The requirement of 6 months or more of service means active, continuous service, during one or more enlistment periods. Any such veteran who develops a tropical disease listed in paragraph (d) of this section, or a disorder or disease resulting from therapy administered in connection with a tropical disease or as a preventative, will be considered to have incurred such disability in active military service if the disease or disorder is shown to have manifested:

(1) No later than 1 year after discharge or release from active military service; or

(2) At a time when accepted medical literature indicates that the incubation period commenced during active military service unless clear and unmistakable evidence shows that the tropical disease was not contracted as the result of active military service.

(Authority: 38 U.S.C. 1133)

§ 5.266 Disability compensation for certain qualifying chronic disabilities.

(a) Qualifying chronic disability. (1) General rule. VA will pay disability compensation to a Persian Gulf veteran who exhibits objective indications of a qualifying chronic disability, provided that such disability became manifest either during active military service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10 percent or more disabling not later than December 31, 2016.

(i) Objective indications of chronic disability. 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.

(ii) 6-month period of chronicity. 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.

(2) Definition. For purposes of this section, a qualifying chronic disability is a chronic disability resulting from any of the following (or any combination of the following):

(i) An undiagnosed illness;

(ii) A medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms; or

(iii) Any diagnosed illness that the Secretary determines in regulations prescribed under 38 U.S.C. 1117(d) warrants a presumption of service connection.

(3) Rating a qualifying chronic disability. A qualifying chronic disability referred to in this section will be rated using rating criteria from the Schedule for Rating Disabilities in part 4 of this chapter for an injury or disease in which the functions affected, anatomical localization, or signs or symptoms are similar.

(4) Qualifying chronic disability considered service connected. A qualifying chronic disability to which this section refers will be considered service connected for purposes of all laws of the U.S.

(b) Undiagnosed illness. (1) Definition. The term undiagnosed illness means an illness that by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

(2) Signs and symptoms. Signs or symptoms that may be manifestations of undiagnosed illness include, but are not limited to:

(i) Abnormal weight loss;

(ii) Cardiovascular signs or symptoms;

(iii) Fatigue;

(iv) Gastrointestinal signs or symptoms;

(v) Headache;

(vi) Joint pain;

(vii) Menstrual disorders;

(viii) Muscle pain;

(ix) Neurologic signs and symptoms;

(x) Neuropsychological signs or symptoms;

(xi) Signs or symptoms involving the respiratory system (upper or lower);

(xii) Signs or symptoms involving skin; and

(xiii) Sleep disturbances.

(c) Medically unexplained chronic multisymptom illness. (1) Definition. The term medically unexplained chronic multisymptom illness means a diagnosed illness without conclusive etiology or pathophysiology, which is characterized by overlapping signs and symptoms, and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained.

(2) Illnesses. Medically unexplained chronic multisymptom illnesses include, but are not limited to, those that are defined by a cluster of signs or symptoms, such as:

(i) Chronic fatigue syndrome;

(ii) Fibromyalgia;

(iii) Functional gastrointestinal disorders (excluding structural gastrointestinal diseases).

NOTE TO PARAGRAPH (c)(2)(iii): Functional gastrointestinal disorders are a group of conditions characterized by chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease and

may be related to any part of the gastrointestinal tract. Specific functional gastrointestinal disorders include, but are not limited to, irritable bowel syndrome, functional dyspepsia, functional vomiting, functional constipation, functional bloating, functional abdominal pain syndrome, and functional dysphagia. These disorders are commonly characterized by symptoms including abdominal pain, substernal burning or pain, nausea, vomiting, altered bowel habits (including diarrhea, constipation), indigestion, bloating, postprandial fullness, and painful or difficult swallowing. Diagnosis of specific functional gastrointestinal disorders is made in accordance with established medical principles, which generally require symptom onset at least 6 months prior to diagnosis and the presence of symptoms sufficient to diagnose the specific disorder at least 3 months prior to diagnosis.

(3) Signs and symptoms. Signs or symptoms that may be manifestations of a medically unexplained chronic multisymptom illness include, but are not limited to:

(i) Abnormal weight loss;

(ii) Cardiovascular signs or symptoms;

(iii) Fatigue;

(iv) Gastrointestinal signs or symptoms;

(v) Headache;

(vi) Joint pain;

(vii) Menstrual disorders;

(viii) Muscle pain;

(ix) Neurologic signs and symptoms;

(x) Neuropsychological signs or symptoms;

(xi) Signs or symptoms involving the respiratory system (upper or lower);

(xii) Signs or symptoms involving skin; and

(xiii) Sleep disturbances.

(d) Definitions. For purposes of this section:

(1) Persian Gulf veteran means a veteran who served on active military service in the Southwest Asia theater of operations during the Persian Gulf War.

(2) The Southwest Asia theater of operations means 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, 1118)

§ 5.267 Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

(a) Presumption of service connection. VA will presume that the injuries and diseases listed in paragraph (b) of this section were incurred in or aggravated by service when the evidence of record establishes that the veteran:

(1) Underwent full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite during active military service; and

(2) Subsequently developed an injury or disease associated with a specific agent, as shown in paragraph (b) of this section.

(b) Listed injuries or diseases. The following table lists injuries or diseases that VA will consider associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

Injury or disease	**Associated with nitrogen mustard?**	**Associated with sulfur mustard?**	**Associated with Lewisite?**
Acute nonlymphocytic leukemia	Yes	No	No
Asthma, chronic	Yes	Yes	Yes
Bronchitis, chronic	Yes	Yes	Yes
Conjunctivitis, chronic	Yes	Yes	No
Corneal opacities	Yes	Yes	No
Emphysema, chronic	Yes	Yes	Yes
Keratitis	Yes	Yes	No
Laryngeal cancer	Yes	Yes	No
Laryngitis, chronic	Yes	Yes	Yes
Lung cancer (except mesothelioma)	Yes	Yes	No
Nasopharyngeal cancer	Yes	Yes	No
Obstructive pulmonary disease, chronic	Yes	Yes	Yes
Scar formation	Yes	Yes	No
Squamous cell carcinoma of the skin	Yes	Yes	No

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

§ 5.268 Presumption of service connection for diseases associated with exposure to ionizing radiation.

(a) Eligibility. This section applies to a "radiation-exposed veteran." That is, any person who, while serving on active duty or as 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.

(b) Diseases presumed service connected. VA will presume that the following diseases were incurred in or aggravated by service if they become manifest in a radiation-exposed veteran at any time after service:

(1) Bronchiolo-alveolar carcinoma;

(2) Cancer of the bile ducts;

(3) Cancer of the bone;

(4) Cancer of the brain;

(5) Cancer of the breast;

(6) Cancer of the colon;

(7) Cancer of the esophagus;

(8) Cancer of the gall bladder;

(9) Cancer of the lung;

(10) Cancer of the ovary;

(11) Cancer of the pancreas;

(12) Cancer of the pharynx;

(13) Cancer of the salivary gland;

(14) Cancer of the small intestine;

(15) Cancer of the stomach;

(16) Cancer of the thyroid;

(17) Cancer of the urinary tract (for purposes of this section, the term urinary tract means the kidneys, renal pelves, ureters, urinary bladder, and urethra);

(18) Leukemia (other than chronic lymphocytic leukemia);

(19) Lymphomas (except Hodgkin's disease);

(20) Multiple myeloma; and

(21) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

(c) Radiation-risk activity. For purposes of this section, radiation-risk activity means:

(1) Onsite participation in a test involving the atmospheric detonation of a nuclear device. For purposes of this section, onsite participation means:

(i) During the official operational period of a nuclear test, defined in paragraph (e) of this section, 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;

(ii) During the 6-month period following the official operational period of a 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, but not limited to, decontamination of equipment used during the nuclear test;

(iii) 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; and

(iv) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(2) Service during the occupation of Hiroshima or Nagasaki, Japan, by U.S. forces during the period beginning on August 6, 1945, and ending on July 1, 1946. This includes official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, that 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.

(3) Internment as a prisoner of war in Japan during World War II, or service on active duty in Japan immediately following such internment, resulting in an opportunity for exposure to ionizing radiation comparable to that of the U.S. occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning August 6, 1945, and ending July 1, 1946. This includes a former prisoner of war who at any time during the period August 6, 1945, through July 1, 1946:

(i) Was interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki;

(ii) Can affirmatively show that he or she worked within an area described in paragraph (c)(3)(i) of this section although not interned in either area;

(iii) Immediately following internment, performed official military duties described in paragraph (c)(2) of this section; or

(iv) Was repatriated through the port of Nagasaki.

(4) Official military duties on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for a total of at least 250 days before February 1, 1992, if, during such service the veteran:

(i) Was monitored for exposure to radiation of external parts of the body by a dosimetry badge each of the 250 days at the plant; or

(ii) For each of the 250 days, served in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

NOTE TO PARAGRAPH (c)(4): For purposes of this paragraph (c)(4), the term day refers to all or any portion of a calendar day.

(5) Service before January 1, 1974, on Amchitka Island, Alaska, if the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(6) Service in a capacity that would qualify the person for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384l(14) if it had been performed as an employee of the Department of Energy.

(d) Atmospheric detonation. For purposes of this section, the term “atmospheric detonation” includes underwater nuclear detonations.

(e) Operational period. For purposes of this section, for tests conducted by the U.S., the term operational period means:

(1) For Operation TRINITY, the period July 16, 1945, through August 6, 1945;

(2) For Operation CROSSROADS, the period July 1, 1946, through August 31, 1946;

(3) For Operation SANDSTONE, the period April 15, 1948, through May 20, 1948;

(4) For Operation RANGER, the period January 27, 1951, through February 6, 1951;

(5) For Operation GREENHOUSE, the period April 8, 1951, through June 20, 1951;

(6) For Operation BUSTER-JANGLE, the period October 22, 1951, through December 20, 1951;

(7) For Operation TUMBLER-SNAPPER, the period April 1, 1952, through June 20, 1952;

(8) For Operation IVY, the period November 1, 1952, through December 31, 1952;

(9) For Operation UPSHOT-KNOTHOLE, the period March 17, 1953, through June 20, 1953;

(10) For Operation CASTLE, the period March 1, 1954, through May 31, 1954;

(11) For Operation TEAPOT, the period February 18, 1955, through June 10, 1955;

(12) For Operation WIGWAM, the period May 14, 1955, through May 15, 1955;

(13) For Operation REDWING, the period May 5, 1956, through August 6, 1956;

(14) For Operation PLUMBBOB, the period May 28, 1957, through October 22, 1957;

(15) For Operation HARDTACK I, the period April 28, 1958, through October 31, 1958;

(16) For Operation ARGUS, the period August 27, 1958, through September 10, 1958;

(17) For Operation HARDTACK II, the period September 19, 1958, through October 31, 1958;

(18) For Operation DOMINIC I, the period April 25, 1962, through December 31, 1962; and

(19) For Operation DOMINIC II/PLOWSHARE, the period July 6, 1962, through August 15, 1962.

NOTE TO § 5.268: If this section does not apply in a particular case, VA will consider service connection under § 5.269, Direct service connection for diseases associated with exposure to ionizing radiation.

(Authority: 38 U.S.C. 1112(c), 1137)

CROSS REFERENCE: § 5.1, for the definition of “reserve component”. § 5.140, Determining former prisoner of war status, for the definition of “former prisoner of war”.

§ 5.269 Direct service connection for diseases associated with exposure to ionizing radiation.

(a) Scope. This section does not establish a presumption of service connection. It establishes standards and procedures VA will apply when a claim for service connection is based on exposure to ionizing radiation during active military service, and is for a disease that is not presumed service connected under § 5.268. Service connection will not be granted under this section unless the veteran meets all of the requirements of (1), (2), and (3) of this paragraph (a). If a veteran meets these requirements, then before adjudication the VA agency of original jurisdiction (AOJ) will refer the claim to the Under Secretary for Benefits for further consideration in accordance with paragraph (d) of this section.

(1) The 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 any other claimed in-service event;

(2) The veteran subsequently developed a radiogenic disease listed in paragraph (b) of this section; and

(3) The disease first became manifest within the period specified in paragraph (b) of this section.

(b) Radiogenic disease. For purposes of this section, radiogenic disease means a disease that may be induced by ionizing radiation.

(1) Listed diseases. The following table lists diseases that VA will consider radiogenic when they manifest within the associated manifestation period.

Disease	Manifestation period
Bone cancer	No later than 30 years after exposure.
Cancer (any other not listed)	5 years or more after last exposure.
Leukemia (all forms except chronic lymphatic (lymphocytic))	At any time after exposure.
Lymphomas other than Hodgkin's disease	5 years or more after last exposure.
Non-malignant thyroid nodular disease	5 years or more after last exposure.
Parathyroid adenoma	5 years or more after last exposure.
Posterior subcapsular cataracts	6 months or more after exposure.
Tumors of the brain and central nervous system	5 years or more after last exposure.

(2) Polycythemia vera. Public Law 98-542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases under this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(3) of this section.

(3) Other diseases. If a claimant claims disability compensation for a disease based on ionizing radiation exposure and that disease is not one listed in paragraph

(b)(1) of this section, VA will consider the claim under this section if the claimant has cited or filed competent scientific or medical evidence that the claimed condition is a radiogenic disease.

(c) Development of dose assessment by a VA agency of original jurisdiction—(1) Dose assessment request. In all claims for service connection for a radiogenic disease under this section, the AOJ will request a dose assessment to determine the likelihood that exposure to ionizing radiation in service caused the veteran's disease. The AOJ will request a dose assessment as follows:

(i) Atmospheric nuclear weapons test participation claims. In all claims based upon participation in atmospheric nuclear testing, the AOJ will request dose assessment 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, the AOJ will request a dose assessment from the appropriate office of the Department of Defense.

(iii) Other exposure claims. In all other claims involving ionizing radiation exposure, the AOJ will request any available records concerning the veteran's exposure to ionizing radiation from the proper custodian, as described in this paragraph (c). These records normally include, but are not limited to, the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained; service treatment records; dose records from the radiation dosimetry office of the veteran’s branch of military service; and other records that might contain information pertaining to

the veteran's ionizing radiation dose in service. The AOJ will forward all such records to the Under Secretary for Health, who will prepare a dose assessment, to the extent feasible, based on available methodologies. As used in this section, "the Under Secretary for Health" includes his or her designees.

(2) When a dose assessment obtained under paragraph (c)(1) of this section is reported as a range of doses to which a veteran may have been exposed, VA will presume exposure at the highest level of the range reported.

(3) Evidence substantiating exposure. For purposes of paragraph (c)(1)(i) and (ii) of this section, VA will not require a veteran or a veteran's survivors 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 assertion that the veteran was present where and when the claimed exposure occurred.

(4) Presence at a nuclear site. For purposes of paragraphs (c)(1)(i) and (ii) of this section, if military records do not establish presence at or absence from a site at which exposure to ionizing radiation is claimed to have occurred, VA will concede the veteran's presence at the site. Conceding presence under this section does not confer entitlement to the presumptive provisions of § 5.268.

(d) Submission to the Under Secretary for Benefits. (1) After the development in paragraphs (c)(1) through (4) of this section has been completed, except as provided in paragraph (d)(2) of this section, the AOJ will forward the dose assessment and any other evidence, along with the veteran's claims file, to the Under Secretary for Benefits for review.

(2) After the development in paragraphs (c)(1) through (4) of this section has been completed, the AOJ will decide the claim based on general principles of service connection without forwarding the claims file to the Under Secretary for Benefits for review if the evidence establishes that any of the following is true:

(i) The claimed disability or disease is not radiogenic (as provided in paragraphs (b)(1) through (3) of this section);

(ii) The disease did not become manifest during the time period specified in paragraph (b)(1) of this section; or

(iii) The veteran was either not exposed to ionizing radiation in service as claimed or the actual or estimated dose exposure was reported to be 0 rem.

(e) Review and action by the Under Secretary for Benefits—(1) Referral to the Under Secretary for Health. The Under Secretary for Benefits will review the evidence of record and may request an advisory medical opinion from the Under Secretary for Health as to whether the veteran's disease resulted from exposure to ionizing radiation in service. The Under Secretary for Health will also review any records obtained and the dose assessment(s) prepared. The Under Secretary for Health will prepare and send his or her advisory medical opinion to the Under Secretary for Benefits.

(2) Reconciliation of dose assessments. (i) Reconciliation by the Under Secretary for Benefits. Prior to referral to the Under Secretary for Health, the Under Secretary for Benefits will reconcile any material difference between the dose assessment obtained through the development process in paragraph (c)(1) of this

section and the dose assessment from a credible source filed by or on behalf of the claimant.

(ii) Independent expert opinion. The Under Secretary for Benefits will request an opinion from an independent expert when it is necessary to reconcile a material difference described in paragraph (e)(2)(i) of this section. The Director of the National Institutes of Health is responsible for selecting the independent expert. VA will forward the assessments and supporting documentation of record to the independent expert, who will then prepare a separate radiation dose assessment for consideration in adjudicating the claim. For purposes of this paragraph (e):

(A) The difference between the claimant's assessment and the dose assessment derived from official military records will ordinarily be considered material if one assessment is at least double the other assessment.

(B) A dose assessment will be considered to be 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.

(f) Opinion of the Under Secretary for Benefits. (1) General rule. When the Under Secretary for Benefits receives the Under Secretary for Health’s advisory medical opinion, he or she will review it, along with the evidence of record. If the Under Secretary for Benefits is convinced that sound scientific and medical evidence supports the determination that it is at least as likely as not that the veteran's disease resulted from ionizing radiation in service, he or she will inform the AOJ of this determination in

writing. This document must include the rationale for the determination, including an evaluation of the claim based on the following:

(i) 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;

(ii) The relative sensitivity of the involved tissue to induction of the specific pathology by ionizing radiation;

(iii) The veteran's gender and pertinent family history;

(iv) The veteran's age at time of exposure;

(v) The time between exposure and onset of the disease; and

(vi) The extent to which exposure to ionizing radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(2) Definitions. For purposes of paragraph (e)(1) of this section, the term sound scientific evidence means observations, findings, or conclusions that are statistically and epidemiologically valid, are statistically significant, are capable of replication, and are capable of withstanding peer review. The term sound medical evidence means observations, findings, or conclusions that are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(3) Determination of no reasonable possibility of causation. If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from ionizing radiation exposure in service, he or she will inform the AOJ in writing, stating the rationale for this conclusion.

(4) Request for an outside consultant. The Under Secretary for Benefits will request an opinion from an outside consultant when, after review of the evidence, including the opinion of the Under Secretary for Health, the Under Secretary for Benefits is unable to determine whether it is at least as likely as not, or whether there is no reasonable possibility, that the veteran's disease resulted from ionizing radiation exposure in service. The Under Secretary for Health will select the consultant from outside VA, based on the recommendation of the Director of the National Cancer Institute. The written request to the consultant will include copies of pertinent medical records, and, where available, dose assessments from official sources, credible sources, and independent experts. The request will identify the following elements:

(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 ionizing radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

(5) Consultant’s opinion. The consultant will evaluate the claim based on the factors specified in paragraph (f)(1) of this section. The consultant will provide his or her opinion in writing and state whether it is either likely, unlikely, or at least as likely as

not that the veteran's disease resulted from exposure to ionizing radiation in service. The consultant will provide his or her rationale supporting the opinion.

(6) Review of consultant's opinion. The consultant will send the opinion to the Under Secretary for Benefits who will review it and transmit it with any comments to the AOJ for use in adjudication of the claim.

(g) Adjudication of claim. The AOJ will adjudicate the claim under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinions provided by the Under Secretary for Benefits, the Under Secretary for Health, or any outside consultants, and the evaluations published pursuant to 38 CFR 1.17.

(h) Supervening cause in claims based on exposure to ionizing radiation. In no case will service connection be established if evidence establishes that a supervening condition or event unrelated to service is more likely the cause of the disease than was exposure to ionizing radiation in service.

(Authority: 38 U.S.C. 501; Pub. L. 98-542, 98 Stat. 2725)

CROSS REFERENCE: § 5.1,for the definition of "agency of original jurisdiction,","competent evidence," "service treatment records."

§ 5.270 Presumption of service connection for amyotrophic lateral sclerosis.

(a) Development of amyotrophic lateral sclerosis. Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military service is sufficient to establish service connection for that disease.

(b) Denial of service connection. Service connection will not be established under this section if:

(1) The veteran did not have active, continuous service of 90 days or more; or If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military service;

(2) The presumption of service connection is rebutted in accordance with § 5.260(c).

(Authority: 38 U.S.C. 501(a)(1))

§ 5.271 Presumption of service connection for infectious diseases

(a) A disease listed in paragraph (b) of this section will be service connected if it becomes manifest in a veteran with a qualifying period of service, provided the provisions of paragraph (c) of this section are also satisfied.

(b) The diseases referred to in paragraph (a) of this section are the following:

(1) Brucellosis.

(2) Campylobacter jejuni.

(3) Coxiella burnetii (Q fever).

(4) Malaria.

(5) Mycobacterium tuberculosis.

(6) Nontyphoid Salmonella.

(7) Shigella.

(8) Visceral leishmaniasis.

(9) West Nile virus.

(c) The diseases listed in paragraph (b) of this section will be considered to have been incurred in or aggravated by service under the circumstances outlined in paragraphs (c)(1) and (2) of this section even though there is no evidence of such disease during the period of service.

(1) With three exceptions, the disease must have become manifest to a degree of 10 percent or more disabling no later than 1 year after the date of separation from a qualifying period of service as specified in paragraph (c)(2) of this section. Malaria must have become manifest to a degree of 10 percent or more disabling no later than 1 year after the date of separation from a qualifying period of service or at a time when standard or accepted medical literature indicate that the incubation period commenced during a qualifying period of service. There is no time limit for visceral leishmaniasis or tuberculosis to have become manifest to a degree of 10 percent or more disabling.

(2) For purposes of this section, the term qualifying period of service means either:

(i) A period of active military service in Afghanistan after September 18, 2001; or

(ii) A period of active military service in the Southwest Asia theater of operations during the Persian Gulf War. The Southwest Asia theater of operations means 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.

(d) Long-term health effects potentially associated with infectious diseases–(1) A report of the Institute of Medicine of the National Academy of Sciences has identified the following long-term health effects that potentially are associated with the infectious diseases listed in paragraph (b) of this section. These health effects and diseases are listed alphabetically and are not categorized by the level of association stated in the National Academy of Sciences report (see Table to § 5.271). If a veteran who has or had an infectious disease listed in the table also has a health effect identified in the table as potentially related to that infectious disease, VA must determine, based on the evidence in each case, whether the infectious disease caused the health effect for purposes of determining entitlement to disability compensation. This does not preclude a finding that other manifestations of disability or secondary conditions were caused by an infectious disease.

(2) If a veteran presumed service connected for one of the diseases listed in paragraph (b) of this section has one of the health effects listed in the table, which manifests within the period specified, or at any time if no period is specified, VA will request a medical opinion as to whether it is at least as likely as not that the veteran's infectious disease actually caused the associated health effect.

TABLE TO § 5.271—LONG-TERM HEALTH EFFECTS POTENTIALLY ASSOCIATED WITH INFECTIOUS DISEASES	
Infectious Disease	Health Effect
Brucellosis	• Arthritis. • Cardiovascular, nervous, and respiratory system infections. • Chronic meningitis and meningoencephalitis. • Deafness. • Demyelinating meningovascular syndromes. • Episcleritis. • Fatigue, inattention, amnesia, and depression. • Guillain-Barré syndrome. • Hepatic abnormalities, including granulomatous hepatitis. • Multifocal choroiditis. • Myelitis-radiculoneuritis. • Nummular keratitis. • Papilledema. • Optic neuritis. • Orchioepididymitis and infections of the genitourinary system. • Sensorineural hearing loss. • Spondylitis. • Uveitis.
Campylobacter jejuni	• Guillain-Barré syndrome if manifest within 2 months of the infection. • Reactive arthritis if manifest within 3 months of the infection. • Uveitis if manifest within 1 month of the infection.
Coxiella burnetii (Q fever)	• Chronic hepatitis. • Endocarditis. • Osteomyelitis. • Post-Q-fever chronic fatigue syndrome. • Vascular infection.
Malaria	• Demyelinating polyneuropathy. • Guillain-Barré syndrome. • Hematologic manifestations (particularly anemia after falciparum malaria and splenic rupture after vivax malaria). • Immune-complex glomerulonephritis.

	• Neurologic disease, neuropsychiatric disease, or both. • Ophthalmologic manifestations, particularly retinal hemorrhage and scarring. • Plasmodium falciparum. • Plasmodium malariae. • Plasmodium ovale. • Plasmodium vivax. • Renal disease, especially nephrotic syndrome.
Mycobacterium tuberculosis	• Active tuberculosis. • Long-term adverse health outcomes due to irreversible tissue damage from severe forms of pulmonary and extrapulmonary tuberculosis and active tuberculosis.
Nontyphoid Salmonella	• Reactive arthritis if manifest within 3 months of the infection.
Shigella	• Hemolytic-uremic syndrome if manifest within 1 month of the infection. • Reactive arthritis if manifest within 3 months of the infection.
Visceral leishmaniasis	• Delayed presentation of the acute clinical syndrome. • Post-kala-azar dermal leishmaniasis if manifest within 2 years of the infection. • Reactivation of visceral leishmaniasis in the context of future immunosuppression.
West Nile virus	• Variable physical, functional, or cognitive disability.

§§ 5.272–5.279 [Reserved]

§ 5.280 General rating principles.

(a) Use of rating schedule. VA will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the degree of disabilities in claims for disability compensation and in eligibility determinations. Instructions for using the schedule are in part 4 of this chapter.

(b) Extra-schedular ratings in unusual cases. (1) Disability compensation. To accord justice to the exceptional case where the Veterans Service Center (VSC) finds the VA Schedule for Rating Disabilities to be inadequate to rate a specific service-connected disability, the Under Secretary for Benefits or the Director of the Compensation Service, upon VSC submission, is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the disability. The governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the disability is exceptional or unusual due to such related factors as:

(i) Marked interference with employment, or

(ii) Frequent periods of hospitalization.

(2) Effective date. The effective date of an extra-schedular rating, either granting or increasing disability compensation, will be in accordance with § 5.311 in original and reopened claims, and in accordance with § 5.312 in claims for increased benefits.

(c) Advisory opinions. The VSC may submit to the Director of the Compensation Service for advisory opinion cases in which it does not understand the application of the Schedule for Rating Disabilities in part 4 of this chapter or in which the propriety of an extra-schedular rating is questionable.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.281 Multiple 0 percent service-connected disabilities.

VA will assign a 10 percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10 percent rating if the veteran has any other compensable rating.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.282 Special consideration for paired organs and extremities.

(a) General rule. VA will pay disability compensation for the combination of service-connected and nonservice-connected disabilities involving paired organs and extremities described in paragraph (b) of this section as if the nonservice-connected disability were service connected, but VA will not pay compensation for the nonservice-connected disability if the veteran's willful misconduct proximately caused it.

(b) Qualifying combination of disabilities. Disability compensation under paragraph (a) of this section is payable for the following disability combinations:

(1) Service-connected impairment of vision in one eye and nonservice-connected impairment of vision in the other eye if:

(i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or

(ii) The peripheral field of vision for each eye is 20 degrees or less.

(2) Service-connected anatomical loss or loss of use of one kidney and nonservice-connected involvement of the other kidney.

(3) Service-connected hearing impairment in one ear compensable to a degree of 10 percent or more disabling and nonservice-connected hearing impairment in the other ear that meets the provisions of § 5.366.

(4) Service-connected anatomical loss or loss of use of one hand or foot and nonservice-connected anatomical loss or loss of use of the other hand or foot.

(5) Permanent service-connected disability of one lung rated as 50 percent or more disabling and nonservice-connected disability of the other lung.

(c) Offset of judgment, settlement, or compromise—(1) Required offset. If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of

such judgment, settlement, or compromise against the increased disability compensation payable under this section.

(2) Offset procedure. Beginning the first of the month after the veteran receives the money or property as damages, VA will not pay the increased disability compensation payable under this section until the total amount of such increased compensation that would otherwise have been payable equals the total amount of any money received as damages and the fair market value of any property received as damages. VA will not withhold the increased disability compensation payable before the end of the month in which the money or property was received.

(3) Exception for Social Security or workers' compensation benefits. Benefits received for the qualifying nonservice-connected disability under Social Security or workers' compensation laws are not subject to the offset described in paragraph (c)(1) of this section, even if the benefits are awarded in a judicial proceeding.

(4) Duty to report receipt of judgment, settlement, or compromise. A veteran entitled to receive increased disability compensation under this section must report to VA the total amount of any money and the fair market value of any property received as damages described in paragraph (c)(1) of this section. Expenses related to the cause of action, such as attorneys' fees, cannot be deducted from the total amount to be reported.

(Authority: 38 U.S.C. 1160)

§ 5.283 Total and permanent total ratings and unemployability.

(a) Total disability ratings—(1) General. VA will consider total disability to exist when any impairment of mind or body renders it impossible for the average person to follow a substantially gainful occupation. VA generally will not assign total ratings for temporary exacerbations or acute infectious diseases except where the Schedule for Rating Disabilities in part 4 of this chapter (the Schedule) specifically prescribes total ratings for temporary exacerbations or acute infectious diseases. For compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent.

(2) Schedular rating or total disability rating based on individual unemployability. VA may assign a total rating for any disability or combination of disabilities in the following cases:

(i) The Schedule prescribes a 100 percent rating, or

(ii) In a case in which VA assigns a rating of less than 100 percent, if the veteran meets the requirements of § 4.16 of this chapter or, in pension cases, the requirements of § 4.17 of this chapter.

(3) Ratings of total disability based on history. In the case of a disability that has undergone some recent improvement, VA may nonetheless assign a rating of total disability, provided:

(i) That the disability was severe enough in the past to warrant a total disability rating;

(ii) That the disability:

(A) Required extended, continuous, or intermittent hospitalization;

(B) Produced total industrial incapacity for at least 1 year; or

(C) Results in recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it is the opinion of the agency of original jurisdiction (AOJ) that, despite the recent improvement of the physical condition, the veteran will be unable to adjust into a substantially gainful occupation. The AOJ will consider the frequency and duration of totally incapacitating exacerbations since incurrence of the original injury or disease and the periods of hospitalization for treatment in determining whether the average person could reestablish himself or herself in a substantially gainful occupation.

(b) Permanent total disability. VA will consider a total disability to be permanent when an impairment of mind or body that makes it impossible for the average person to follow a substantially gainful occupation is reasonably certain to continue throughout the life of the disabled person.

(1) VA will consider the following disabilities or conditions as constituting a permanent total disability:

(i) The permanent anatomical loss or loss of use of both hands, or of both feet, or of one hand and one foot;

(ii) The anatomical loss or loss of sight of both eyes;

(iii) Being permanently so significantly disabled as to need regular aid and attendance; or

(iv) Being permanently bedridden.

(2) VA will consider an injury or disease of long-standing that is actually totally incapacitating as a permanent total disability, if the probability of permanent improvement under treatment is remote.

(3) VA may not assign a permanent total disability rating as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present the permanent anatomical loss or loss of use of extremities or the permanent anatomical loss or loss of sight of both eyes, as described in paragraph (b)(1) of this section, the person is permanently so significantly disabled as to need regular aid and attendance or permanently bedridden, or when it is reasonably certain that following a decrease of the acute or temporary symptoms the person will continue to be totally disabled due to residuals of the disease, accident, or injury.

(4) VA may consider the age of the disabled person in determining whether a total disability is permanent.

(c) Insurance ratings. A rating of permanent and total disability for insurance purposes will have no effect on a rating for compensation or pension.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.284 Total disability ratings for disability 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 § 5.283.

(Authority: 38 U.S.C. 1155)

(b) Incarcerated veterans. VA will not assign a total disability rating based on individual unemployability for compensation purposes while a veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony if the rating would first become effective during such period of incarceration. However, VA will reconsider the case to determine if continued eligibility for such rating exists if a total disability rating based on individual unemployability existed prior to incarceration for the felony and routine review was required.

(Authority: 38 U.S.C. 5313(c))

(c) Program for vocational rehabilitation. Each time VA assigns a total disability rating based on individual unemployability, the agency of original jurisdiction will inform the Vocational Rehabilitation and Employment Service of the rating so the Vocational Rehabilitation and Employment Service may offer to evaluate whether it is reasonably feasible for the veteran to achieve a vocational goal.

(Authority: 38 U.S.C. 1163)

§ 5.285 Discontinuance of total disability ratings.

(a) General. VA will not reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination showing material improvement in physical or mental condition. VA may reduce a total disability rating that

was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error.

(1) VA will consider examination reports showing material improvement in conjunction with all the facts of record, including whether:

(i) The veteran improved under the ordinary conditions of life, i.e., while working or actively seeking work; or

(ii) The symptoms have been brought under control by prolonged rest or by following a regimen which precludes work.

(2) If either circumstance in paragraph (a)(1)(ii) of this section applies, VA will not reduce a total disability rating until VA has reexamined the person after a period of 3 to 6 months of employment.

(3) Paragraphs (a) introductory text, (a)(1), and (a)(2) of this section do not apply to a total rating that was purely based on hospital, surgical, or residence treatment, or individual unemployability.

(b) Individual unemployability. (1) VA may reduce a service-connected total disability rating based on individual unemployability upon a showing of clear and convincing evidence of actual employability.

(2) When a veteran with a total disability rating based on individual unemployability is undergoing vocational rehabilitation, education, or training, VA will not reduce the rating because of that rehabilitation, education, or training unless the AOJ receives:

(i) Evidence of marked improvement or recovery in physical or mental conditions that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her;

(ii) Evidence of employment progress, income earned, and prospects of economic rehabilitation that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her; or

(iii) Evidence that the physical or mental demands of the course are obviously incompatible with total disability.

(3) 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 will be considered evidence of employability.

(4) If a veteran with a total disability rating based on individual unemployability begins a substantially gainful occupation, VA may not reduce the veteran's rating 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 paragraph (b)(4), VA will not consider brief interruptions in employment to be breaks in otherwise continuous employment.

(Authority: 38 U.S.C. 501(a), 1155, 1163(a))

CROSS REFERENCE: §§ 5.170, Calculation of 5-year, 10-year, and 20-year periods to qualify for protection, and 5.172, protection of continuous 20-year ratings.

§§ 5.286–5.299 [Reserved]

ADDITIONAL DISABILITY COMPENSATION BASED ON A DEPENDENT PARENT

§ 5.300 Establishing dependency of a parent.

(a) Conclusive dependency. (1) VA will find that a veteran's parent is dependent if the parent is not residing in a foreign country and the parent's monthly income, as counted in accordance with §§ 5.302 through 5.304, does not exceed the following amounts:

(i) $400 for a mother or father, or a remarried parent and parent's spouse, not living together, or $660 for a mother and father, or a remarried parent and parent's spouse, living together; or

(ii) $185 for each additional family member, as defined by paragraph (c) of this section.

(2) If a parent meets the requirements of paragraph (a)(1) of this section, VA will not consider net worth.

(b) Factual dependency. If a parent does not meet the requirements of paragraph (a)(1) of this section, the veteran must establish dependency of the parent based on the following rules:

(1) Income requirement. VA will find dependency if the parent does not have sufficient income to provide reasonable maintenance for the parent, a parent's spouse

living together with the parent, and any additional family members, as defined in paragraph (c) of this section.

(i) Reasonable maintenance includes not just basic necessities such as housing, food, clothing, and medical care, but also other items generally necessary to provide those conveniences and comforts of living consistent with the parent's reasonable style of life.

(ii) A finding that the parent's income includes financial contributions from the veteran does not establish that the parent is the veteran's dependent. VA will consider such contributions in connection with all of the other evidence when deciding factual dependency.

(iii) Income of a minor family member from business or property will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support.

(2) Net worth considered. (i) VA will not find that dependency of a parent exists when some part of the parent's net worth should reasonably be used for that parent's maintenance. See § 5.414 for the factors used to determine whether net worth should reasonably be used for maintenance.

(ii) Net worth of a minor family member will be considered in determining dependency of a parent only if it is actually available to the veteran's parent for the minor's support.

(c) Definition of family member. For purposes of this section, the term family member means a relative who lives with the parent, other than a spouse, whom the

parent is under a moral or legal obligation to support. This includes, but is not limited to, a relative under the legal age in the state where the parent resides, a relative of any age who is dependent on the parent because of physical or mental incapacity, and a relative who is physically absent from the household for a temporary purpose or for reasons beyond the relative's control.

(d) Duty to report change in dependency status. If a veteran is receiving additional disability compensation because of a parent's dependency and the parent's income exceeds the applicable amount specified in paragraph (a)(1) of this section, the veteran must report an increase in the parent's income or net worth to VA when the veteran acquires knowledge of the increase. Failure to report such an increase may create an overpayment subject to recovery by VA.

(e) Remarriage of a parent. Dependency will not be discontinued solely because a parent has married or remarried after VA has granted additional disability compensation for a dependent parent. Additional disability compensation for a parent's dependency will be continued if evidence is filed showing that the parent continues to meet the requirement for a finding of conclusive dependency or factual dependency under this section.

(Authority: 38 U.S.C. 102, 1115, 1135)

§ 5.301 [Reserved]

§ 5.302 General income rules—parent's dependency.

(a) All payments included in income. VA will count all payments of any kind from any source in determining the income of a veteran's parent, except as provided in § 5.304, Exclusions from income—parent's dependency. For the definition of "payments", see § 5.370(h).

(b) Spousal income combined. The dependent parent's income includes the income of the parent and the parent's spouse, unless the marriage has been terminated or the parent is legally separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other parent or the veteran's stepparent. The income of the parent's spouse will be subject to the same rules that are applicable to determining the income of the veteran's parent.

(c) Income of family members under 21 years of age. VA will count income earned by a family member who is under 21 years of age but will consider income from a business or property (including trusts) of such a family member only if that income is actually available to the veteran's parent for the support of that family member. For purposes of this section, "family member" is defined in § 5.300(c).

(d) Income-producing property. VA will count income from all property, real or personal, in which a veteran's parent has an interest. See § 5.410(f) for how VA determines ownership of property.

(e) Calculation of income from profit on the sale of property. The following rules apply when determining the amount of income a parent receives from net profit on the sale of business or non-business real or personal property, except for net profit on the sale of a parent's principal residence, which is governed by § 5.304(h).

(1) Value deducted from sales price. (i) If the parent purchased the property after VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the purchase price, including the cost of improvements, from the selling price to determine net profit.

(ii) If the parent purchased the property before VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the value of the property on the date of entitlement from the selling price to determine net profit.

(2) Installment sales. If the parent receives payments from the sale of the property in installments, such payments will not be considered income until the total amount received is equal to the purchase price of the property (including cost of improvements), or, where paragraph (e)(1)(ii) of this section applies, until the total amount received is equal to the value of the property on the date VA established the veteran's entitlement to additional disability compensation based on the parent's dependency. Principal and interest received with each payment will not be counted separately.

(Authority: 38 U.S.C. 102)

§ 5.303 Deductions from income—parent's dependency.

(a) Expenses of a business or profession. VA will deduct from a parent's income necessary operating expenses of a business, farm, or profession. See § 5.413 for how to calculate these expenses.

(b) Expenses associated with recoveries for death or disability. VA will deduct from a parent's income medical, legal, or other expenses incident to injury or death from recoveries for such injury or death. For purposes of this paragraph (b), the recovery may be from any of the following sources:

(1) Commercial disability, accident, life, or health insurance;

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any workmen's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

(c) Certain salary deductions not deductible. For purpose of calculating a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 102)

§ 5.304 Exclusions from income—parent's dependency.

VA will exclude the following when calculating income for the purpose of establishing a parent's dependency:

(a) Property rental value. The rental value of a residence a parent owns and lives in.

(b) Certain waived retirement benefits. Retirement benefits from any of the following sources, if the benefits have been waived pursuant to Federal statute:

(1) Civil Service Retirement and Disability Fund;

(2) Railroad Retirement Board;

(3) District of Columbia for firemen, policemen, or public school teachers; or

(4) Former U.S. Lighthouse Service.

(c) Death gratuity. Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Public Law 102-25, 105 Stat. 82.

(d) Certain VA benefit payments. The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, Compensation for Service-Connected Disability or Death;

(2) Payments under 38 U.S.C. chapter 13, Dependency and Indemnity Compensation for Service-Connected Death;

(3) Nonservice-connected VA disability and death pension payments;

(4) Payments under 38 U.S.C. 5121, Payment of certain accrued benefits upon death of a beneficiary;

(5) Payments under 38 U.S.C. 2302, Funeral expenses; and

(6) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(e) Certain life insurance payments. Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, National Service Life Insurance, or Veterans' Group Life Insurance.

(f) State service bonuses. Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) Fire loss reimbursement. Proceeds from fire insurance.

(h) Profit from sale of principal residence. Net profit from the sale of the parent's principal residence.

(1) Extent of exclusion. VA will not count net profit realized from the sale of the parent's principal residence to the extent that it is applied within the calendar year of the sale, or the following calendar year, to the purchase price of another residence as the parent's principal residence.

(2) Limitation on date of purchase of replacement residence. This exclusion does not apply if the parent applied the net profit from the sale to the price of a residence purchased earlier than the calendar year preceding the calendar year of sale of the old residence.

(3) Time limit for reporting application of profit to purchase of replacement residence. To qualify for this exclusion, the veteran must report the application of the net profit from the sale of the old residence to the purchase of the replacement residence no later than 1 year after the date it was so applied.

(i) Payment for civic obligations. Payments received for discharge of jury duty or other obligatory civic duties.

(j) Increased inventory value of a business. The value of an increase of stock inventory of a business.

(k) Employer contributions. An employer's contributions to health and hospitalization plans for either an active or retired employee.

(l) Caregiver stipend. The stipend for primary family caregivers authorized by 38 U.S.C. 1720G(a)(3)(A)(ii)(V) and 38 CFR 71.40(c)(4).

(m) Other payments. Payments listed in § 5.706.

(Authority: 38 U.S.C. 102)

§§ 5.305–5.310 [Reserved]

DISABILITY COMPENSATION EFFECTIVE DATES

§ 5.311 Effective dates—award of disability compensation.

(a) Claim received no later than 1 year after discharge or release from active military service. If VA grants disability compensation based on a claim VA received no later than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the later of:

(1) The day after such discharge or release from active military service; or

(2) The date entitlement arose.

(b) Claim received more than 1 year after discharge or release from active military service. If VA grants disability compensation based on a claim VA received more than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the date established by § 5.150(a).

(Authority: 38 U.S.C. 5110(a), (b)(1))

§ 5.312 Effective dates—increased disability compensation.

(a) Applicability. This section establishes the effective date of an award of increased disability compensation based on:

(1) A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter.

(2) A higher disability rating under the extra-schedular provision in § 5.280(b).

(3) A higher disability rating under § 4.16 of this chapter.

(4) An award or a higher rate of special monthly compensation.

NOTE TO PARAGRAPH (a): This section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247 which is governed by § 5.311.

(b) Effective date of increase—(1) Claim received no later than 1 year after increase. An award of increased disability compensation will be effective on the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation no later than 1 year after that date.

(2) Claim received more than 1 year after increase. An award of increased disability compensation will be effective on the date established by § 5.150(a) if VA received a claim for increased disability compensation more than 1 year after the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation.

(Authority: 38 U.S.C. 5110(a) and (b)(2))

§ 5.313 Effective dates—discontinuance of compensation for a total disability rating based on individual unemployability.

(a) Scope. This section applies to discontinuance of a veteran's total disability rating based on individual unemployability (TDIU) after employability is regained or based on failure to return an employment questionnaire to VA.

(b) Discontinuance on regaining employability. If VA determines that a veteran has regained employability, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective in accordance with paragraph (e) of § 5.177.

(c) Failure to return employment questionnaire. If a veteran fails to return an employment questionnaire to VA within the time specified in VA Form 21-4140, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective beginning the first day of the month after the month VA last paid TDIU benefits.

(Authority: 38 U.S.C. 5112(a) and (b)(6))

§ 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.

(a) Scope. This section applies to discontinuance of additional disability compensation paid to a veteran for a dependent parent if that parent is no longer dependent.

(b) Discontinuance based on a change in a parent's economic status. If VA determines that a veteran's parent is no longer dependent due to an improvement in economic status, the additional disability compensation paid due to parental dependency will be discontinued as follows:

(1) Increase in income. If dependency ends based on an increase in income, VA will discontinue paying the additional disability compensation on the first day of the month after the month in which the income increased.

(2) Increase in net worth. If dependency ends based on an increase in net worth, VA will discontinue paying the additional disability compensation on the first day of the calendar year after the year in which the net worth increased.

(c) Discontinuance based on a change in a parent's marital status. If VA determines that the marriage, remarriage, annulment of a marriage, or divorce of a dependent parent resulted in the end of dependency of that parent, VA will discontinue paying the additional disability compensation effective the first day of the month after the date the change in marital status occurred.

(d) Discontinuance based on a parent's death. If a dependent parent dies, VA will discontinue paying the additional disability compensation on the first day of the month after the month of death.

(Authority: 38 U.S.C. 5112(b)(2) and (4))

§ 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

(a) Scope. This rule applies under the following circumstances:

(1) VA previously denied a claim or discontinued payments of additional disability compensation based upon parental dependency because of a parent's net worth;

(2) The denial or discontinuation became final; and

(3) Entitlement to additional disability compensation based upon parental dependency was subsequently established, or reestablished, because of a decrease in the parent's net worth.

(b) Payment of additional compensation. If a parent's net worth decreases so that additional disability compensation based on parental dependency is warranted, VA will pay additional disability compensation as follows:

(1) For claims filed before the actual decrease in net worth, effective the first day of the month after the month of the decrease; or

(2) For claims filed after the actual decrease in net worth, effective the first day of the month after the receipt of a new claim for additional disability compensation.

(Authority: 38 U.S.C. 501(a), 5110)

§§ 5.316–5.319 [Reserved]

SPECIAL MONTHLY COMPENSATION: GENERAL

§ 5.320 Determining need for regular aid and attendance.

For purposes of this part, a person needs regular aid and attendance if he or she meets either of the following conditions:

(a) Person has need for assistance. The person, based on his or her condition as a whole, has a temporary or permanent need for assistance, which may be provided by a family member or other member of his or her household, as shown by the extent to which his or her ability to perform any or all of the following functions is impaired:

(1) Getting dressed or undressed.

(2) Keeping clean and presentable.

(3) Making frequent and necessary adjustments to a prosthetic or orthopedic appliance. This does not include the adjustment of appliances that able persons also cannot adjust without assistance, such as lacing at the back, supports, and belts.

(4) Eating or drinking, as a result of the loss of coordination of the upper extremities or extreme weakness.

(5) Attending to bowel and bladder needs.

(6) Protecting himself or herself from the hazards or dangers of his or her daily environment.

(Authority: 38 U.S.C. 1114(l)–(m), (r))

(b) Person is bedridden. The person is bedridden. Bedridden means the person must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of periods of intermittent bed rest. See § 5.324(e) (regarding entitlement to special monthly compensation based on being permanently bedridden).

(Authority: 38 U.S.C. 1114(l)–(m), (r))

§ 5.321 Additional disability compensation for a veteran whose spouse needs regular aid and attendance.

(a) General entitlement. A veteran who has a service-connected disability rating of at least 30 percent is entitled to special monthly compensation if his or her spouse needs regular aid and attendance, as defined in paragraphs (b) and (c) of this section.

(b) Automatic eligibility. The spouse will be considered to need regular aid and attendance if any of the following factors apply:

(1) The spouse has corrected visual acuity of 5/200 or less in both eyes;

(2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes; or

(3) The spouse is a patient in a nursing home because of mental or physical incapacity.

(c) Factual need. If the spouse does not meet the criteria in paragraph (b) of this section, the spouse will be considered to need regular aid and attendance if he or she meets the criteria of § 5.320.

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

CROSS REFERENCE: § 5.1, for the definition of "nursing home".

§ 5.322 Special monthly compensation: general information and definitions of disabilities.

(a) Scope. (1) Special monthly compensation (SMC). Multiple regulations (§§ 5.321 and 5.323 through 5.333) allow SMC to a veteran who has certain service-connected disabilities. Except as specified in paragraph (a)(2) of this section, the disabilities referred to in §§ 5.323 through 5.333 must be service connected. The monetary rates of payment of SMC are found in 38 U.S.C. 1114 and 1115(1)(E). They are also on the internet at http://www.va.gov and are available from any VA regional office. Under 38 U.S.C. 1114 and 1115(1)(E), a veteran is entitled to SMC if he or she receives disability compensation and:

(i) Needs regular aid and attendance (see § 5.320);

(ii) Is permanently bedridden;

(iii) Has certain disabilities or combinations of disabilities; or

(iv) Has a spouse who needs regular aid and attendance.

(2) Nonservice-connected disabilities. VA will consider certain nonservice-connected disabilities in determining entitlement to SMC. See § 5.323(c)(5) (contribution of nonservice-connected loss of use of creative organ to service-connected loss of use of creative organ); § 5.330(b) and (c) (bilateral deafness of specified severity); and § 5.331(b) (bilateral blindness as specified with bilateral deafness as specified).

(3) Definitions. This section defines disabilities that establish entitlement to SMC and that are not defined in other regulations.

(b) Loss of use of a hand means the hand functions no better than a prosthesis would function if attached to the arm at a point of amputation below the elbow. In making this determination, VA will consider the actual remaining function of the hand, including, but not limited to, whether the hand can perform acts such as grasping or manipulation with the same proficiency as an amputation stump with prosthesis. Complete ankylosis of two major joints of an upper extremity is an example of a situation that will constitute loss of use of the hand. The major joints of the upper extremity are the shoulder, elbow, and wrist.

(c) Loss of use of a foot means the foot functions no better than a prosthesis

would function if attached to the leg at a point of amputation below the knee. In making this determination, VA will consider the actual remaining function of the foot, including, but not limited to, whether the foot can perform acts such as balance or propulsion with the same proficiency as an amputation stump with prosthesis. Examples of situations that will constitute loss of use of a foot include:

(1) Extremely unfavorable complete ankylosis of the knee, that is, the knee fixed in flexion at an angle of 45 degrees or more;

(2) Complete ankylosis of two major joints of the lower extremity, that is, of the hip, knee, or ankle;

(3) Shortening of the lower extremity of 3.5 inches or more; and

(4) Complete paralysis of the external popliteal nerve (common peroneal) and resulting foot drop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants that confirm complete paralysis of the nerve.

(d) Natural elbow or knee action prevented when a prosthesis is in place means that the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint. If there is no movement of the joint (as in complete ankylosis or complete paralysis) and a prosthesis is not used, VA will determine entitlement to SMC based on prevented natural elbow or knee action as if a prosthesis were in place.

(e) Use of prosthesis prevented means that the veteran's disability prevents the use of prosthesis. This can establish the veteran's entitlement to SMC in two

circumstances:

(1) Anatomical loss near the shoulder. A veteran meets the requirements for SMC based on anatomical loss of the upper extremity (arm) near the shoulder if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the arm but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm with factors preventing natural elbow action with a prosthesis in place (see paragraph (d) of this section).

(2) Anatomical loss near the hip. A veteran meets the requirements for SMC based on anatomical loss of the lower extremity (leg) near the hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the leg but could wear a prosthesis if there were a re-amputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the leg with factors preventing natural knee action with a prosthesis in place (see paragraph (d) of this section).

(f) Visual acuity of 5/200 or less. If the veteran has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating under the Schedule for Rating Disabilities in part 4 of this chapter based on visual acuity of 5/200, the veteran is not considered to have visual acuity of 5/200 or less for purposes of eligibility for SMC. See § 4.79 of this chapter.

(g) Loss of use or blindness of one eye, having only light perception means that the veteran is unable to recognize test letters at 1 foot and cannot perceive objects or hand movements, or count fingers, at a distance of 3 feet. A veteran is eligible for SMC under this paragraph (g) if he or she meets the criteria in the preceding sentence, even if the veteran can perceive objects or hand movements, or can count fingers, at distances of less than 3 feet. See § 4.79 of this chapter.

(Authority: 38 U.S.C. 501(a), 1114)

SPECIAL MONTHLY COMPENSATION: SPECIFIC STATUTORY BASES

§ 5.323 Special monthly compensation under 38 U.S.C. 1114(k).

(a) Basic entitlement. Special monthly compensation (SMC) under 38 U.S.C. 1114(k) is payable to a veteran who has the following disabilities:

(1) Anatomical loss or loss of use of one hand;

(2) Anatomical loss or loss of use of one foot;

(3) Anatomical loss or loss of use of both buttocks;

(4) Anatomical loss or loss of use of one or more creative organs;

(5) Blindness of one eye having only light perception;

(6) Deafness of both ears having absence of air and bone conduction;

(7) Complete organic aphonia with constant inability to communicate by speech; or

(8) In the case of a female veteran, either of the following factors:

(i) Anatomical loss of 25 percent or more of tissue from a single breast or both breasts in combination (including, but not limited to, loss by mastectomy or partial mastectomy); or

(ii) Treatment of breast tissue with radiation ("treatment" includes therapeutic procedures but not diagnostic procedures).

CROSS REFERENCES: §§ 5.322(b) and (c), respectively (criteria to determine anatomical loss or loss of use of a hand or of a foot); 5.322(g)(criteria to determine loss of use or blindness of one eye, having only light perception).

(b) Limitations—(1) Combining ratings under 38 U.S.C. 1114(k) with ratings under 38 U.S.C. 1114(a) through (j), or (s). SMC under 38 U.S.C. 1114(k) is payable in addition to the disability compensation authorized by 38 U.S.C. 1114(a) through (j), or (s), subject to the following limitation: The combined rate of disability compensation must not exceed the monthly rate provided by 38 U.S.C. 1114(l) when authorized in conjunction with any of the rates provided by 38 U.S.C. 1114(a) through (j), or (s).

(2) Combining ratings under 38 U.S.C. 1114(k) with ratings under 38 U.S.C. 1114(l) through (n), or (p). (i) If the veteran has entitlement under 38 U.S.C. 1114(l) through (n), or (p), SMC under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use in addition to the losses used to establish entitlement under 38 U.S.C. 1114(l) through (n), or (p), as long as the combined monthly disability compensation does not exceed the monthly rate provided by 38 U.S.C. 1114(o).

(ii) A disability for which SMC is paid under 38 U.S.C. 1114(k) may not be a basis for a higher level of SMC under 38 U.S.C. 1114(l) through (n). However, VA will pay SMC under 1114(k) concurrently with SMC under 1114(l) through (n) as long as the same disability is not the basis for SMC under both 1114(k) and either (l), (m), or (n). The total combined rate of SMC cannot exceed the amount set forth in 38 U.S.C. 1114(o).

(3) Exclusion. The additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) is not subject to the limitations of paragraph (b) of this section regarding maximum monthly disability compensation payable under 38 U.S.C. 1114(k) in combination with other rates.

(c) Creative organ. (1) Definition. Creative organ means an organ directly involved in reproduction.

(2) Anatomical loss. Anatomical loss of a creative organ exists in any of the following circumstances:

(i) Acquired absence of one or both testicles (other than undescended testicles);

(ii) Acquired absence of one or both ovaries; or

(iii) Acquired absence of other creative organs.

(3) Loss of use. Loss of use of a creative organ exists in any of the following circumstances:

(i) The diameters of the affected testicle are reduced to one-third of the corresponding diameters of the normal testicle;

(ii) The diameters of the affected testicle are reduced to one-half or less of the

corresponding normal testicle with changes in consistency of the affected testicle (harder or softer) when compared to the normal testicle;

(iii) Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran; or

(iv) Medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. This could occur if the veteran has:

(A) In the case of paired creative organs, the loss of function of at least one such organ; or

(B) In the case of an unpaired creative organ, loss of function.

(4) SMC for erectile dysfunction. SMC under 38 U.S.C. 1114(k) is payable for erectile dysfunction as the loss of use of a creative organ even if the veteran uses prescription medications or mechanical devices to treat the erectile dysfunction. This rule applies regardless of whether such treatment is effective.

(5) SMC for anatomical loss. SMC under 38 U.S.C. 1114(k) is payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use. Examples of this include, but are not limited to, the following factors:

(i) The veteran had a vasectomy before military service with the anatomical loss or loss of use of one testicle during military service;

(ii) The veteran had a vasectomy following military service with a subsequent prostatectomy as a result of service-connected prostate cancer;

(iii) The veteran had impotence as a result of a nonservice-connected psychiatric condition with subsequent prostatectomy due to service-connected prostate cancer; or

(iv) The veteran had a tubal ligation before service with a subsequent oophorectomy due to service-connected injury or disease.

(6) SMC for loss due to elective surgery. SMC under 38 U.S.C. 1114(k) is not payable when anatomical loss or loss of use of a creative organ resulted from elective surgery performed after military service. However, if the elective surgery after service was necessary to correct an injury caused by surgery during military service, SMC under 38 U.S.C. 1114(k) is payable. Surgery performed based on sound medical advice for relief of a pathological condition or to prevent possible future pathological consequences is not considered to be elective surgery.

(7) Atrophy. Atrophy resulting from mumps followed by orchitis in service is presumed service connected. Because atrophy is usually perceptible no later than 1 to 6 months after infection subsides, an examination more than 6 months after the remission of orchitis demonstrating a normal genitourinary system will be considered in determining if the presumption is rebutted.

(d) Determining loss of use of both buttocks. (1) General rule. Loss of use of both buttocks exists if there is severe damage by injury or disease to muscle group XVII, bilaterally, (see §§ 4.56 and 4.73 of this chapter) and additional disability making it impossible for the person, without assistance, to rise from a seated position and from a stooped position (fingers to toes position) and to maintain postural stability (pelvis upon head of femur). The cited assistance may be provided by the person's hands or arms, and, in the matter of postural stability, by a special appliance.

(2) With SMC for lower extremities. The receipt of SMC for anatomical loss or

loss of use of both lower extremities under 38 U.S.C.1114 (l) through (n) does not prevent the receipt of SMC under 38 U.S.C. 1114(k) for loss of use of both buttocks if appropriate tests clearly substantiate there is such additional loss of use.

(e) Deafness. Deafness of both ears, having absence of air and bone conduction, exists if an authorized VA audiology examination shows bilateral hearing loss equal to or greater than the bilateral hearing loss required for a maximum rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(f) Aphonia. Complete organic aphonia exists if a person has a disability of the speech organs that constantly prevents communication by speech.

(Authority: 38 U.S.C. 1114(k))

§ 5.324 Special monthly compensation under 38 U.S.C. 1114(l).

Special monthly compensation (SMC) under 38 U.S.C. 1114(l) is payable to a veteran who has any of the following disabilities:

(a) Anatomical loss or loss of use of both feet.

(b) Anatomical loss or loss of use of one hand and one foot.

(c) Each eye having either:

(1) Blindness with visual acuity of 5/200 or less under § 5.322(f); or

(2) Concentric contraction of the visual field to 5 degrees or less.

(d) Disability or disabilities causing the veteran to be permanently bedridden, which means evidence shows that the veteran must remain in bed and that the confinement to bed will continue throughout his or her lifetime.

(e) Disability or disabilities establishing the veteran's need for regular aid and attendance under § 5.320. Unless the veteran is entitled to additional SMC under 38 U.S.C. 1114(r) (see § 5.332), VA will award SMC under 38 U.S.C. 1114(l) based on permanently bedridden status if the veteran is permanently bedridden (see paragraph (d) of this section) rather than on the need for regular aid and attendance.

(Authority: 38 U.S.C. 1114(l))

CROSS REFERENCES: See §§ 5.320(b), Person is bedridden; 5.322(b), (c), Special monthly compensation: general information and definitions of disabilities; 5.330, Special monthly compensation under 38 U.S.C. 1114(o) (combining awards made under §§ 5.324, 5.326, or 5.328).

§ 5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m) for any of the combinations of disabilities listed in paragraphs

(a) through (d) of this section. The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(l) and (m), rounded down to the next lower dollar.

(a) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss or loss of use of the other foot.

(b) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one foot.

(c) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss or loss of use of one hand.

(d) Blindness of one eye with visual acuity of 5/200 or less, or concentric contraction of the visual field to 5 degrees or less of one eye; and blindness of the other eye, having only light perception.

(Authority: 38 U.S.C. 1114(p))---

CROSS REFERENCE: § 5.322, Special monthly compensation: general information and definitions of disabilities (criteria for the disabilities listed in § 5.325).

§ 5.326 Special monthly compensation under 38 U.S.C. 1114(m).

Special monthly compensation under 38 U.S.C. 1114(m) is payable for any of the

following combinations of disabilities:

(a) Anatomical loss or loss of use of both hands.

(b) Anatomical loss or loss of use of both legs with factors preventing natural knee action with prosthesis in place.

(c) Anatomical loss of one leg with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of the other foot.

(d) Anatomical loss or loss of use of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one foot.

(e) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place.

(f) Anatomical loss of one leg with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one hand.

(g) Blindness in both eyes having only light perception.

(h) Blindness of one eye with visual acuity of 5/200 or less or with concentric

contraction of the visual field to 5 degrees or less; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(i) Blindness in both eyes leaving the veteran so significantly disabled as to need regular aid and attendance. If the veteran has visual acuity of 5/200 or less in both eyes or concentric contraction of the visual field to 5 degrees or less in both eyes, then entitlement to compensation at the 38 U.S.C. 1114(m) rate will be determined on the facts in the individual case.

(Authority: 38 U.S.C. 1114(m), (p))

CROSS REFERENCES: §§ 5.320, Determining need for regular aid and attendance; 5.322, Special monthly compensation: general information and definitions of disabilities (criteria for the disabilities listed in § 5.326); 5.330, Special monthly compensation under 38 U.S.C. 1114(o) (combining awards made under §§ 5.324, 5.326, or 5.328). See also § 4.76 of this chapter, Examination of field [of] vision (criteria for blindness based on concentric contraction of the visual field).

§ 5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section. The intermediate rate is the arithmetic mean

between the rates for 38 U.S.C. 1114(m) and (n), rounded down to the nearest dollar.

(a) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of the other hand.

(b) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss of the other leg with factors preventing the use of a prosthetic appliance.

(c) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place.

(d) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss of one leg with factors preventing the use of a prosthetic appliance.

(e) Blindness of one eye, having only light perception; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(Authority: 38 U.S.C. 1114(p))

CROSS REFERENCES: §§ 5.322, Special monthly compensation: general information and definitions of disabilities; 5.326, Special monthly compensation under 38 U.S.C. 1114(m).

§ 5.328 Special monthly compensation under 38 U.S.C. 1114(n).

VA will pay special monthly compensation under 38 U.S.C. 1114(n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section.

(a) Anatomical loss or loss of use of both arms with factors preventing natural elbow action with prosthesis in place.

(b) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one hand.

(c) Anatomical loss of both legs with factors preventing the use of prosthetic appliances.

(d) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss of one leg with factors preventing the use of a prosthetic appliance.

(e) Anatomical loss of both eyes, blindness without light perception in both eyes,

or anatomical loss of one eye and blindness without light perception in the other eye.

(Authority: 38 U.S.C. 1114(n), (p))

CROSS REFERENCES: §§ 5.322, Special monthly compensation: general information and definitions of disabilities; 5.326, Special monthly compensation under 38 U.S.C. 1114(m); 5.327, Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n) (criteria for the disabilities listed in § 5.328); 5.330, Special monthly compensation under 38 U.S.C. 1114(o) (combining awards made under §§ 5.324, 5.326, or 5.328).

§ 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o) for anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss of the other arm with factors preventing the use of a prosthetic appliance. The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(n) and (o), rounded down to the next lower dollar.

(Authority: 38 U.S.C. 1114(p))

CROSS REFERENCES: §§ 5.322, Special monthly compensation: general information and

definitions of disabilities; 5.328, Special monthly compensation under 38 U.S.C. 1114(n) (criteria for the disabilities listed in § 5.329).

§ 5.330 Special monthly compensation under 38 U.S.C. 1114(o).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(o) for any of the following combinations of disabilities:

(a) Anatomical loss of both arms with factors preventing the use of prosthetic appliances.

(b) Bilateral deafness rated at 60 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with blindness with bilateral visual acuity of 20/200 or less.

(c) Total deafness in one ear, or bilateral deafness rated at 40 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with service-connected blindness of both eyes having only light perception or less vision.

(d) Loss of use of both lower extremities together with loss of anal and bladder sphincter control. VA will consider that the requirement of loss of anal and bladder sphincter control is met even though incontinence has been overcome under a strict regimen of rehabilitation training and/or other auxiliary measures.

(e) Disabilities entitling the veteran to two or more of the monetary rates provided in 38 U.S.C. 1114(l) through (n), without considering any disabilities twice.

(1) Separate and distinct disabilities. Entitlement under this paragraph (e) must be based on separate, distinct disabilities.

(2) Common cause. A common cause of disabilities that are otherwise separate and distinct will not preclude entitlement to SMC under this paragraph (e). For example, a veteran with anatomical loss or loss of use of both hands and both feet resulting from a common cause would nevertheless be entitled to SMC.

(Authority: 38 U.S.C. 1114(o))

CROSS REFERENCES: §§ 5.320, Determining need for regular aid and attendance; 5.322, Special monthly compensation: general information and definitions of disabilities; 5.328, Special monthly compensation under 38 U.S.C. 1114(n); 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o); 5.332, Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2) (criteria based in part on the disabilities listed in § 5.330).

§ 5.331 Special monthly compensation under 38 U.S.C. 1114(p).

(a) Intermediate or next higher level of special monthly compensation. In the event the veteran's disabilities exceed the requirements for any of the rates prescribed

under §§ 5.324 through 5.329, VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(p) as provided in paragraphs (b) through (f) of this section. However, the payment cannot exceed the rate under 38 U.S.C. 1114(o). An intermediate rate authorized by this section is the arithmetic mean between the two rates of SMC, rounded down to the next lower dollar.

(b) Bilateral blindness in combination with deafness. (1) Total deafness of one ear. Blindness in both eyes meeting the criteria of § 5.324(c), § 5.325(d), or § 5.326(h) or (i), with service-connected total deafness in one ear, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(2) Bilateral deafness rated 10 or 20 percent disabling. Blindness in both eyes meeting the criteria of § 5.326(g), § 5.327(e), or § 5.328(e), with bilateral deafness rated at 10 percent or 20 percent disabling (even if the hearing impairment in one ear is nonservice connected) entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(3) Bilateral deafness rated at least 30 percent disabling. Blindness in both eyes, meeting the criteria of § 5.324(c), § 5.325(d), § 5.326(g), (h), or (i), § 5.327(e), or § 5.328(e), with bilateral deafness rated 30 percent or more disabling (even if the hearing impairment in one ear is nonservice connected) entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(c) Bilateral blindness in combination with anatomical loss or loss of use of a hand or foot. Blindness in both eyes, meeting the criteria of § 5.324(c), § 5.325(d), § 5.326(g), (h), or (i), § 5.327(e), or § 5.328(e), combined with any of the disabilities described in this paragraph (c)).

(1) Anatomical loss or loss of us of hand. Anatomical loss or loss of use of one hand entitles the veteran to the next higher statutory rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(2) Anatomical loss or loss of use of foot rated at least 50 percent disabling. Anatomical loss or loss of use of one foot which by itself or in combination with another compensable disability would be rated at 50 percent or more disabling, entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(3) Anatomical loss or loss of use of foot rated less than 50 percent disabling. Anatomical loss or loss of use of one foot which is rated less than 50 percent disabling and which is the only compensable disability other than bilateral blindness, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(d) Additional independent disability or disabilities rated 50 percent or more disabling. (1) General rule. If a veteran is entitled to SMC under one of the rates

payable under §§ 5.324 through 5.329 and also has a permanent disability, or combination of permanent disabilities, which are independently rated at 50 percent or more disabling, VA will award the veteran SMC at the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, VA will award the next higher rate under 38 U.S.C. 1114. This benefit may not be paid concurrently with the 100 percent rate pursuant to 38 U.S.C. 1114(p) under § 5.331(e).

(2) Independently rated means that the additional disability or disabilities rated at 50 percent or more disabling are separate and distinct, and involve different anatomical segments or bodily systems, from the disability or disabilities establishing entitlement under §§ 5.324 through 5.329. If the bases for the additional disability or disabilities and the basis for entitlement to SMC under §§ 5.324 through 5.329 are caused by the same injury or disease, VA cannot pay the next higher intermediate rate unless the additional disability or disabilities would be rated 50 percent or more disabling without regard to the basis for entitlement to SMC under §§ 5.324 through 5.329.

(3) Permanent residuals of tuberculosis. Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 50 percent disability rating.

(e) Additional independent disability rated 100 percent. (1) General rule. If a veteran is entitled to SMC at one of the rates payable under §§ 5.324 through 5.329 and has a single permanent disability that is independently rated 100 percent disabling, VA will award the veteran the next higher rate under 38 U.S.C. 1114. If the veteran is receiving SMC at an intermediate rate, VA will award to the next higher intermediate

rate. The single permanent disability must be independently rated 100 percent disabling without regard to individual unemployability. The rate payable under this paragraph (e) cannot be paid concurrently with the 50 percent-or-more rate payable under paragraph (d) of this section.

(2) Independently rated. For the definition of "independently rated", see paragraph (d)(2) of this section.

(3) Permanent residuals of tuberculosis. Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 100 percent disability rating.

(f) Three extremities. Anatomical loss, loss of use, or a combination of anatomical loss and loss of use of three extremities entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. VA will combine the anatomical loss or loss of use of whichever two extremities will provide the veteran with the highest level of SMC before combining the third anatomical loss or loss of use of an extremity to award the next higher rate. When there is entitlement for triple extremity or blindness with extremity, it will be in addition to any entitlement under 38 U.S.C. 1114(k) or (p) for the 50 or 100 percent elevations for the same extremity.

(Authority: 38 U.S.C. 1114(p))

§ 5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1)

or for a higher level of care under 38 U.S.C. 1114(r)(2).

(a) General rule. The additional allowance that 38 U.S.C. 1114(r) authorizes is payable whether the need for regular aid and attendance or for a higher level of care is a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114(o) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k), or is based on an independent factual determination.

(b) Criteria for additional allowance under 38 U.S.C. 1114(r)(1). A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(1) when all of the following conditions are met:

(1) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(o) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k);

(2) The veteran needs regular aid and attendance under § 5.320; and

(3) The veteran is not hospitalized at U.S. Government expense.

(c) Criteria for additional allowance under 38 U.S.C. 1114(r)(2)—(1) General criteria. A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(2), instead of the allowance under 38 U.S.C. 1114(r)(1), when all of the following conditions are met:

(i) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(o) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k);

(ii) The veteran needs regular aid and attendance under § 5.320;

(iii) The veteran needs a "higher level of care" (as defined in paragraph (c)(2) of this section);

(iv) Without the higher level of care, the veteran would require hospitalization, nursing home care, or other residential institutional care; and

(v) The veteran is not hospitalized at U.S. Government expense.

(2) Higher level of care. For purposes of this paragraph (c), a veteran needs a "higher level of care" whenever the veteran requires personal health-care services provided on a daily basis in the veteran's residence by a person who is licensed to provide these services or who provides these services under the regular supervision of a licensed health-care professional.

(3) Personal health-care services. For purposes of this section, "personal health-care services" include, but are not limited to, physical therapy, administration of injections, placement of indwelling catheters, the changing of sterile dressings, or similar functions, the performance of which requires professional health-care training or the regular supervision of a trained health-care professional.

(4) Licensed health-care professional. For purposes of this section, 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 a political subdivision of a State.

(5) Under the regular supervision of a licensed health-care professional. For purposes of this section, the term under the regular supervision of a licensed health-care professional 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 is sufficient.

(6) Care may be provided by a relative of the veteran or a member of the veteran's household. A relative of the veteran or a member of the veteran's household may perform the necessary personal health-care services. However, such a person must be a licensed health-care professional or provide the necessary personal health-care services under the regular supervision of a licensed health-care professional.

(7) Traumatic brain injury. Subject to § 5.720(c)(1) and (f)(1), if any veteran, as the result of service-connected disability, needs regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under paragraph (c)(1) of this section, and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, VA will pay the veteran, in addition to any other compensation under §§ 5.320 through 5.334, a monthly aid and attendance allowance equal to the rate in 38 U.S.C. 1114(r)(2), which for purposes of 38 U.S.C. 1134 will be considered additional compensation payable for disability. An allowance authorized under this paragraph (c)(7) will be paid in place of any allowance authorized by paragraph (b) of this section.

(Authority: 38 U.S.C. 1114(r), (t))

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.333 Special monthly compensation under 38 U.S.C. 1114(s).

Special monthly compensation under 38 U.S.C. 1114(s) is payable to a veteran who has a single disability rated 100 percent disabling under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter, or a disability that is the sole basis for a rating of total disability based on individual unemployability (TDIU) under § 4.16 of this chapter, and either:

(a) Has an additional disability, or combination of disabilities, rated 60 percent disabling, without consideration of the single disability that was either rated 100 percent or served as the basis for a TDIU rating; or

(b) Is permanently housebound as a result of disability or disabilities, including the single disability that was either rated 100 percent or served as the basis for a TDIU rating. For purposes of this paragraph (b), a veteran is permanently housebound if he or she is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the veteran's lifetime.

(Authority: 38 U.S.C. 1114(s))

§ 5.334 Special monthly compensation tables.

(a) Purpose of tables. The tables in this section are meant as aids to summarize the statutory or intermediate rate of special monthly compensation (SMC) payable to veterans under 38 U.S.C. 1114 for certain combinations of disabilities. The regulatory text in §§ 5.323 through 5.333 describes these benefits in more detail. No additional rights or benefits are conferred by this section. The tables are informative only and will not be used as a basis to grant or deny benefits in a particular case.

(b) Symbols. The following list defines the symbols used in the tables in this section:

L = the rate under 38 U.S.C. 1114(l).

L ½ = the intermediate rate between 38 U.S.C. 1114(l) and (m).

M = the rate under 38 U.S.C. 1114(m).

M ½ = the intermediate rate between 38 U.S.C. 1114(m) and (n).

N = the rate under 38 U.S.C. 1114(n).

N ½ = the intermediate rate between 38 U.S.C. 1114(n) and (o).

O = the rate under 38 U.S.C 1114(o).

(c) Usage. In Tables 1 through 4, the columns and rows are labeled with specific disabilities or combinations of disabilities. The point where a column and row intersect represents the rate or intermediate rate of SMC payable for the specified combination of disabilities. For example, in Table 1, a veteran who has the anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis

in place and anatomical loss of one arm with factors preventing the use of a prosthetic appliance is entitled to the intermediate rate of SMC between 38 U.S.C. 1114(m) and (n) (symbol M ½).

(d) Table 1. To determine the level of SMC payable when there are varying degrees of anatomical loss or loss of use of two extremities, identify the proper degree of loss for one extremity along the top row of Table 1 and the proper degree of loss for the other extremity down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

Table 1 – SMC – extremities only.

Extremities	Anatomical loss or loss of use: one foot	Anatomical loss or loss of use: one hand	Anatomical loss or loss of use: one leg & no knee action	Anatomical loss or loss of use: one arm & no elbow action	Anatomical loss of one leg: near hip	Anatomical loss of one arm: near shoulder
Anatomical loss or loss of use: one foot	L § 5.324(a)	L § 5.324(b)	L½ § 5.325(a)	L½ § 5.325(b)	M § 5.326(c)	M § 5.326(d)
Anatomical loss or loss of use: one hand	L § 5.324(b)	M § 5.326(a)	L½ § 5.325(c)	M½ § 5.327(a)	M § 5.326(f)	N § 5.328(b)

Anatomical loss or loss of use: one leg & no knee action	L½ § 5.325(a)	L½ § 5.325(c)	M § 5.326(b)	M § 5.326(e)	M½ § 5.327(b)	M½ § 5.327(c)
Anatomical loss or loss of use: one arm & no elbow action	L½ § 5.325(b)	M½ § 5.327(a)	M § 5.326(e)	N § 5.328(a)	M½ § 5.327(d)	N½ § 5.329
Anatomical loss of one leg: near hip	M § 5.326(c)	M § 5.326(f)	M½ § 5.327(b)	M½ § 5.327(d)	N § 5.328(c)	N § 5.328(d)
Anatomical loss of one arm: near shoulder	M § 5.326(d)	N § 5.328(b)	M½ § 5.327(c)	N½ § 5.329	N § 5.328(d)	O § 5.330(a)

(e) Table 2. To determine the level of SMC payable when there are varying degrees of blindness in both eyes, identify the proper degree of blindness for one eye down the left column of Table 2 and the proper degree of blindness for the other eye along the top row. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

Table 2 – SMC based on bilateral blindness.

Vision in one eye	Vision in other eye				
	Visual acuity of 5/200 or less	Visual field contraction to 5º or less	Light perception only	No light perception	Anatomical loss of eye
Visual acuity of 5/200 or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Visual field contraction to 5º or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Light perception only	L½ § 5.325(d)	L½ § 5.325(d)	M § 5.326(g)	M½ § 5.327(e)	M½ § 5.327(e)
No light perception	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)
Anatomical loss of eye	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)

(f) Table 3. To determine the level of SMC when there is bilateral blindness together with anatomical loss or loss of use of an extremity, identify the level of SMC for bilateral blindness from Table 3 and locate it along the top row. Then identify the proper extremity loss down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

Table 3 – SMC – bilateral blindness with anatomical loss or lose of use of extremity.

Additional disability	SMC for bilateral blindness alone				
	"L"	**"L½"**	**"M"**	**"M½"**	**"N"**
Service-connected anatomical loss or loss of use of one foot rated less than 50%, and it is the only compensable disability other than blindness	L½ + K § 5.331 (c)(3); § 5.323 (b)(2)	M + K § 5.331 (c)(3); § 5.323 (b)(2)	M½ + K § 5.331 (c)(3); § 5.323 (b)(2)	N + K § 5.331 (c)(3); § 5.323 (b)(2)	N½ + K § 5.331 (c)(3); § 5.323 (b)(2)
Service-connected anatomical loss or loss of use of one foot rated 50% or more, either alone or in combination with another disability	M + K § 5.331 (c)(2); § 5.323 (b)(2)	M½ + K § 5.331 (c)(2); § 5.323 (b)(2)	N + K § 5.331 (c)(2); § 5.323 (b)(2)	N½ + K § 5.331 (c)(2); § 5.323 (b)(2)	O § 5.331 (c)(2)
Service-connected anatomical loss or loss of use of one hand	M + K § 5.331 (c)(1); § 5.323 (b)(2)	M½ + K § 5.331 (c)(1); § 5.323 (b)(2)	N + K § 5.331 (c)(1); § 5.323 (b)(2)	N½ + K § 5.331 (c)(1); § 5.323 (b)(2)	O § 5.331 (c)(1)

(g) Table 4. To determine the level of SMC when there is bilateral blindness together with deafness, identify the level of SMC for bilateral blindness from Table 4 and locate it along the top row. Then identify the proper degree of deafness down the left

column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

Table 4 – SMC – bilateral blindness with deafness.

Additional disability	**SMC for bilateral blindness alone**					
	"L"	**"L½"**	**"M"** under § 5.326 (h) or (i)	**"M"** under § 5.326 (g)	**"M½"**	**"N"**
Service-connected (SC) total deafness in one ear	L½ § 5.331 (b)(1)	M § 5.331 (b)(1)	M½ § 5.331 (b)(1)	O § 5.330 (c)	O § 5.330 (c)	O § 5.330 (c)
Bilateral deafness rated 10% or 20% (one or both ears SC)	No additional SMC	No additional SMC	No additional SMC	M½ § 5.331 (b)(2)	N § 5.331 (b)(2)	N½ § 5.331 (b)(2)
Bilateral deafness rated 30% (one or both ears SC)	M § 5.331 (b)(3)	M½ § 5.331 (b)(3)	N § 5.331 (b)(3)	N § 5.331 (b)(3)	N½ § 5.331 (b)(3)	O § 5.331 (b)(3)
Bilateral						

deafness rated 40% or 50% (one or both ears SC)	M § 5.331 (b)(3)	M½ § 5.331 (b)(3)	N § 5.331 (b)(3)	O § 5.330 (c)	O § 5.330 (c)	O § 5.330 (c)
Bilateral deafness rated 60% or more (one or both ears SC)	O § 5.330 (b)	O § 5.330 (b)	O § 5.330 (b)	O § 5.330 (b)	O § 5.330 (b)	O § 5.330 (b)

(Authority: 38 U.S.C. 1114)

SPECIAL MONTHLY COMPENSATION: EFFECTIVE DATES

§ 5.335 Effective dates: special monthly compensation under §§ 5.332 and 5.333.

(a) General rule. Except as provided in § 5.312 (regarding effective dates of increased disability compensation), and paragraph (b) of this section, the effective date of an award of special monthly compensation (SMC) under § 5.332 or § 5.333 will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(b) Retroactive award of SMC. When VA awards disability compensation, based on an original or reopened claim, for a retroactive period, VA will also award SMC for all or any part(s) of that retroactive period during which the veteran met the eligibility requirements for SMC.

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

§ 5.336 Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.

(a) Award of regular aid and attendance. (1) The effective date of an award of additional compensation payable to a veteran because the veteran's spouse's needs regular aid and attendance will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(2) When VA awards disability compensation based on an original or reopened claim retroactive to an effective date that is earlier than the date of receipt of the claim, VA will also award additional compensation for any part of the retroactive period during which the spouse needed regular aid and attendance.

(b) Discontinuance of additional compensation. If the veteran's spouse no longer needs regular aid and attendance, VA will discontinue additional compensation effective the end of the month in which VA takes the award action to discontinue.

(Authority: 38 U.S.C. 501(a), 5110(b)(1), (2))

§§ 5.337–5.339 [Reserved]

§ 5.340 Pulmonary tuberculosis shown by X-ray in active military 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 the time of entrance into active military service but no X-ray was made, or if made, is not available and there was no notation or other evidence of active or inactive re-infection 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 military service as to compel the conclusion, on the basis of sound medical principles, that they existed prior to entry on active military service.

(c) Primary lesions. Healed primary type tuberculosis shown at the time of entrance into active military service will not be taken as evidence to rebut direct or presumptive service connection for active re-infection type pulmonary tuberculosis.

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

§ 5.341 Presumption of service connection for tuberculous disease; wartime and service after December 31, 1946.

(a) Pulmonary tuberculosis.—(1) General rule. Evidence of activity on comparative study of X-ray films showing pulmonary tuberculosis within the 3-year presumptive period provided by § 5.261(c), will be taken as establishing service connection for active pulmonary tuberculosis subsequently diagnosed by approved methods but service connection and rating may be assigned only from the date of such diagnosis or other evidence of clinical activity.

(2) Notation of inactive tuberculosis. A notation of inactive tuberculosis of the re-infection type at induction or enlistment prevents the grant of service connection under § 5.261 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 nontuberculosis causes will qualify as active tuberculosis. The requirements for presumptive service connection will be the same as those for tuberculosis pleurisy.

(c) Tuberculosis pleurisy and endobronchial tuberculosis. Tuberculosis pleurisy and endobronchial tuberculosis fall within the category of pulmonary tuberculosis for purpose of service connection on a presumptive basis. Either will be held incurred in service when initially manifested within the 3-year presumptive period provided by § 5.261(c).

(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.

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

§ 5.342 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 disability 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 disability compensation on August 19, 1968, ratings will be assigned in accordance with the Schedule for Rating

Disabilities in part 4 of this chapter. This section is not applicable to running award cases.

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

§ 5.343 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, a Clinic Director, or Chief, Outpatient Service certifies, after considering the evidence, including the evidence favoring or opposing tuberculosis and activity, that such diagnosis was incorrect. Doubtful cases may be referred to the Under Secretary for Health in Central Office for a medical opinion.

(b) Department of Veterans Affairs diagnosis. Diagnosis of active pulmonary tuberculosis by the medical authorities of VA as the result of examination, observation, or treatment will be accepted for rating purposes. In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to the Clinic Director or Chief, Outpatient Service, and, if necessary, to the Under Secretary for Health in Central Office for a medical opinion.

(c) Private physician's diagnosis. Diagnosis of active pulmonary tuberculosis by private physicians based on their examination, observation, or treatment will not be accepted to show the disease was initially manifested within the presumptive period

after discharge from active military service unless confirmed by acceptable clinical, X-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment.

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

§ 5.344 Determination of inactivity (complete arrest) of 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 tuberculosis 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 tuberculosis 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 after the date of excision, whichever is later.

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

§ 5.345 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 based on a change in classification from active. At hospital discharge, the permanent and total rating will be discontinued unless the medical evidence does not support a finding of complete arrest (see § 5.344) or 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-month periods. At the expiration of 24 months after hospitalization, the case will be considered under § 5.280 if continued short hours of employment are recommended or if other evidence warrants submission.

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

§ 5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.

(a) General rule. Any veteran who, on August 19, 1968, was receiving or entitled to receive disability compensation for active or inactive (arrested) tuberculosis

may receive special monthly compensation (SMC) under 38 U.S.C. 1114(q) and 1156 as in effect before August 20, 1968.

(b) SMC under 38 U.S.C. 1114(q) for inactive tuberculosis (complete arrest)—(1) Receiving or entitled to receive special monthly compensation for tuberculosis on August 19, 1968. (i) For a veteran who was receiving or entitled to receive SMC for tuberculosis on August 19, 1968, the minimum monthly rate is $67. This minimum SMC is not to be combined with or added to any other disability compensation. The rating criteria for determining inactivity of tuberculosis are set out in § 5.344, Determination of inactivity (complete arrest) of tuberculosis.

(ii) The effective date of SMC under paragraph (b)(1)(i) of this section will be the date the graduated rating of the disability or compensation for that degree of disablement combined with other service-connected disabilities provides compensation payable at a rate less than $67.

(2) Not receiving or entitled to receive SMC for tuberculosis on August 19, 1968. For a veteran who was not receiving or entitled to receive SMC for tuberculosis on August 19, 1968, the SMC authorized by paragraph (b)(1) of this section is not payable.

(Authority: 38 U.S.C. 501(a); Pub. L. 90-493, 82 Stat. 809)

§ 5.347 Continuance of a total disability rating for service-connected tuberculosis.

In service-connected cases, ratings for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities in part 4 of this chapter. Where in the

opinion of the agency of original jurisdiction 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 considered under § 5.280.

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

CROSS REFERENCE: § 5.1, for the definition of "agency of original jurisdiction".

§§ 5.348–5.349 [Reserved]

INJURY OR DEATH DUE TO HOSPITALIZATION OR TREATMENT

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

(a) General rule. (1) Except as provided in paragraph (a)(2) of this section, and subject to paragraphs (c) through (f) of this section, VA will pay disability compensation or dependency and indemnity compensation for an injury, disease, death, or for the aggravation of an existing injury or disease that occurs as a result of an examination, medical or surgical treatment, hospitalization, participation in vocational rehabilitation, or participation in compensated work therapy (CWT) under any law VA administers, as if it were service connected.

(2) VA will not pay the benefits described in paragraph (a)(1) of this section if the injury, disease, death, or the aggravation of an existing injury or disease was the result of the veteran's willful misconduct.

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

(c) Establishing the cause of additional disability or death. Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph (c) and paragraph (d)(1) or (2) of this section. Claims based on additional disability or death due to training and rehabilitation services or CWT program must meet the causation requirements of paragraph (d)(3) of this section.

(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 does not establish cause.

(2) Continuance or natural progress of injury or disease. Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of injury or disease for which the care, treatment, or examination was furnished unless VA's failure to timely diagnose and properly treat the injury or disease proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of injury or disease 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. The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) Care, treatment, or examination. To establish that carelessness, negligence, lack of proper skill, error in judgment, or a similar instance of VA fault 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 substantially complied with the requirements of § 17.32 of this chapter. Minor deviations from the requirements of § 17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (that is, given orally or in writing) or implied under the circumstances specified in § 17.32(b) of this chapter, as in emergency situations.

(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. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable health-care provider would not have considered an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health-care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.

(3) Training and rehabilitation services or compensated work therapy program. To establish that the provision of training and rehabilitation services or a CWT program 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, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services,

or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown 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, services, or CWT program that VA provided or authorized.

(e) Department employees and facilities.—(1) A Department employee is a person:

(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 that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility. The following activities 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; and

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

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

CROSS REFERENCE: § 5.1, for the definition of "nursing home," "proximately caused," and "willful misconduct".

§ 5.351 Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

The effective date of an award of disability compensation under 38 U.S.C. 1151(a) (see § 5.350) will be one of the following:

(a) Disability. Date injury or aggravation was suffered if a claim is received no later than 1 year after that date; otherwise, date of receipt of the claim.

(b) Death. First day of the month in which the veteran's death occurred, if a claim is received no later than 1 year after the date of death; otherwise, date of receipt

of the claim.

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

§ 5.352 Effect of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962, on benefits awarded under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) Offset of a veterans' awards of compensation. If a veteran's disability is the basis of a judgment awarded under 28 U.S.C. 1346(b), or of a settlement or compromise entered under 28 U.S.C. 2672 or 2677, after November 30, 1962, the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees, will be offset from any compensation awarded under 38 U.S.C. 1151(a).

(b) Offset of survivors' awards of dependency and indemnity compensation. If a veteran's death is the basis of a judgment awarded under 28 U.S.C. 1346(b), or of a settlement or compromise entered under 28 U.S.C. 2672 or 2677, after November 30, 1962, only the amount of the judgment, settlement, or compromise 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 representing damages for the veteran's death to compensate for harm the survivor suffered, plus the survivor's proportional share of attorney fees, is to be offset from any dependency and indemnity

compensation awarded under 38 U.S.C. 1151(a).

(c) 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 after November 30, 1962.

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

(d) Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39. (1) VA will reduce the amount of an award of benefits under 38 U.S.C. chapter 21 or 39 by the amount received in a judgment, settlement, or compromise covered in paragraphs (a) through (c) of this section that became final after December 9, 2004, if it included an amount that was specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapters 21 or 39, and VA awards chapter 21 or chapter 39 benefits after the date the judgment, settlement, or compromise becomes final,

CROSS REFERENCES: (§§ 5.604, Specially adapted housing under 38 U.S.C. 2101(a);

5.605, Special Home Adaptation Grants under 38 U.S.C. 2101(b); § 5.603, Financial assistance to purchase a vehicle or adaptive equipment.

(2) If the amount described in paragraph (d)(1) of this section is greater than the amount of an award under 38 U.S.C. chapters 21 or 39, VA will offset the excess amount received under the judgment, settlement, or compromise against benefits otherwise payable under 38 U.S.C. chapter 11.

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

§ 5.353 Effect of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962, on benefits awarded under 38 U.S.C. 1151(a).

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(a) 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 under 28 U.S.C. 1346(b) that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151(a) for the disability or death unless the terms of the judgment provide otherwise.

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

§§ 5.354–5.359 [Reserved]

RATINGS FOR HEALTH-CARE ELIGIBILITY ONLY

§ 5.360 Service connection of dental conditions for treatment purposes.

(a) General principles. (1) Service connection of dental conditions for treatment purposes means VA has determined that a veteran meets the basic eligibility requirements of § 17.161 of this chapter and is eligible for treatment of a dental condition.

(2) VA's Veterans Benefits Administration (VBA) will adjudicate a claim for service connection of a dental condition for treatment purposes after the Veterans Health Administration (VHA) determines a veteran meets the basic eligibility requirements of § 17.161 of this chapter and VHA requests that VBA make a determination on questions that include, but are not limited to any of the following:

i. Former Prisoner of War status;

ii. Whether the veteran has a compensable or non-compensable service-connected dental condition or disability;

iii. Whether the dental condition or disability is a result of combat wounds;

iv. Whether the dental condition or disability is a result of service trauma; or

v. Whether the veteran is totally disabled due to a service-connected disability.

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(b) Establishing service connection. VBA will determine service connection for establishing eligibility for outpatient dental treatment using the following principles:

(1) VBA will consider the condition of teeth and periodontal tissues at the time of entry into active duty.

(2) VBA will consider each defective or missing tooth and each disease of the teeth and periodontal tissue separately to determine whether the condition was incurred or aggravated in line of duty during active military service.

(c) Conditions service connected for treatment purposes. (1) VA will service connect any of the following dental conditions solely for purpose of providing treatment, but will not pay disability compensation for any of the following dental conditions:

(i) Treatable carious teeth.

(ii) Replaceable missing teeth.

(iii) Dental or alveolar abscesses.

(iv) Periodontal disease.

(2) VBA will grant service connection for treatment purposes under this section if the evidence of record shows that the dental condition meets the requirements of paragraph (d) of this section.

(3) These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter.

(d) Aggravation. Notations of conditions made at entry into service and

treatment of such conditions during service (including, but not limited to, fillings, extractions, and placement of a prosthesis) are not evidence of aggravation unless additional pathology developed 180 days or more after entry into active military service.

(1) Teeth noted as normal at entry will be service connected for treatment purposes if they were filled or extracted 180 days or more after entry into active military service.

(2) Teeth noted as filled at entry will be service connected for treatment purposes if they were extracted, or if the existing filling was replaced, 180 days or more after entry into active military service.

(3) Teeth noted as carious but restorable at entry will not be service connected for treatment purposes on the basis that they were filled during service. Service connection may be established for treatment purposes if new caries developed 180 days or more after such teeth were filled.

(4) Teeth noted as carious but restorable at entry will be service connected for treatment purposes if extraction was required 180 days or more after entry into active military service.

(5) Third molars will not be service connected for treatment purposes unless disease or pathology of the tooth developed 180 days or more after entry into active military service.

(6) Impacted or malposed teeth and other developmental defects will not be service connected for treatment purposes unless disease or pathology of the teeth developed 180 days or more after entry into active military service.

(7) Teeth extracted because of chronic periodontal disease will be service

connected for treatment purposes if they were extracted 180 days or more after entry into active military service.

(e) Conditions not service connected for treatment purposes. The following conditions will not be service connected for treatment purposes:

(1) Teeth noted at entry as nonrestorable, regardless of treatment during service.

(2) Teeth noted as missing at entry, regardless of treatment during service.

(3) Calculus.

(Authority: 38 U.S.C. 1712)

CROSS REFERENCE: § 17.161 Authorization of outpatient dental treatment; § 5.140, Determining former prisoner of war status, for the definition of "former prisoner of war".

§ 5.361 Health-care eligibility of a person administratively discharged under other-than-honorable conditions.

(a) General rule. VA will provide health-care and related benefits authorized by chapter 17 of title 38 U.S.C. to certain former servicemembers with administrative discharges under other-than-honorable conditions for any disability incurred or aggravated during active military service in the line of duty.

(b) Eligibility criteria. VA will use the same eligibility criteria that are applicable to determinations of incurrence in service and of incurrence in the line of duty when there is no character of discharge bar to determine a claimant's health-care eligibility.

(c) Characterization of discharge. VA will not furnish health-care and related benefits for any disability incurred in or aggravated during a period of service discontinued by a bad-conduct discharge or when one of the character of discharge bars listed in § 5.31(c) applies.

(Authority: Pub. L. 95-126, 91 Stat. 1106)

§ 5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.

(a) Presumption of service incurrence for active psychosis. For purposes of determining eligibility for hospital, nursing home, domiciliary, and medical care under chapter 17 of title 38, United States Code, VA will presume that the veteran incurred any active psychosis developed under the circumstances described in paragraph (b) of this section in active military service.

(b) Requirements. For purposes of this section, a veteran's active psychosis is presumed incurred in active military service if he or she served during one of the periods of war specified in the following table and developed the psychosis no later than 2 years after discharge from active military service and before the date specified in the

following table that corresponds to the period of war during which the veteran served.

Veteran who served during:	Must have developed active psychosis no later than 2 years after discharge from active military service and before:
World War II	July 26, 1949
Korean conflict	February 1, 1957
Vietnam era	May 8, 1977
Persian Gulf War	The end of 2-year period beginning on the last day of the Persian Gulf War

(Authority: 38 U.S.C. 101(16), 105, 501(a), 1702)

CROSS REFERENCES: §§ 5.1, for the definitions of "nursing home" and "psychosis"; 5.20, Dates of periods of war.

§ 5.363 Determination of service connection for a former member of the Armed Forces of Czechoslovakia or Poland.

For purposes of entitlement to VA medical care under 38 U.S.C. 109(c), the agency of original jurisdiction will determine whether a former member of the Armed Forces of Czechoslovakia or Poland has a service connected disability. This determination will be made using the same criteria that apply to determinations of service connection based on service in the Armed Forces of the U.S.

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

CROSS REFERENCE: § 5.1, for the definition of “agency of original jurisdiction”.

§ 5.364 [Reserved]

MISCELLANEOUS SERVICE-CONNECTION REGULATIONS

§ 5.365 Claims based on the effects of tobacco products.

(a) General rule. Except as provided in paragraph (b) of this section, a disability or death will not be service connected on any basis, including secondary service connection under § 5.246 or § 5.247, if it resulted from injury or disease attributable to the veteran's use during service of tobacco products, such as cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) Exceptions. Paragraph (a) of this section does not prohibit service connection if any of the following is true:

(1) The disability or death can be service connected on some basis other than the veteran's use of tobacco products during service; or

(2) The disability became manifest or death occurred during service; or

(3) The disability or death resulted from injury or disease that manifested to the required degree of disability within any applicable presumptive period under §§ 5.260 through 5.268, § 5.270, or § 5.271; or

(4) Service connection is established for ischemic heart disease or other cardiovascular disease under § 5.248 as secondary to a disability not caused by the use of tobacco products during service.

(Authority: 38 U.S.C. 501(a), 1103)

§ 5.366 Disability due to impaired hearing.

VA will consider impaired hearing to be a disability when any of the following three criteria is satisfied:

(a) The auditory threshold in any of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz is 40 decibels or greater;

(b) The auditory thresholds for at least three of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or

(c) Speech recognition scores using the Maryland CNC Test are less than 94 percent.

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

§ 5.367 Civil service preference ratings for employment in the U.S. government.

For certifying civil service disability preference for purpose of employment by the U.S. government, a service-connected disability may be assigned a rating of less than 10 percent disabling. Any directly or presumptively service-connected disability resulting in actual impairment will qualify the veteran for the civil service preference. For disabilities incurred in combat, however, no actual impairment is required.

(Authority: 38 U.S.C. 501(a), 5 U.S.C. 2108(2)).

§ 5.368 Basic eligibility determinations: home loan and education benefits.

(a) Loans—(1) Scope. A veteran identified in paragraph (a)(3) of this section is eligible for a loan under 38 U.S.C. chapter 37 if

(i) He or she was discharged or released because of a service-connected disability; or

(ii) The official service department records show that he or she had a service-connected disability at the time of separation from service that in VA's medical judgment would have warranted a discharge for disability.

(2) The determinations in paragraph (a)(1)(i) and (ii) of this section are subject to the presumptions of soundness under §§ 5.244(a) and 5.245. This paragraph is also applicable, in determining eligibility to the maximum period of entitlement based on discharge or release for a service-connected disability, regardless of length of service. See § 5.39.

(3) Veterans affected. This paragraph applies to:

(i) A veteran of World War II, the Korean conflict, or the Vietnam era who served for less than 90 days; or

(ii) A veteran who served less than 181 days on active duty as defined in §§ 36.4301 and 36.4501, and whose dates of service were:

(A) After July 25, 1947, and before June 27, 1950;

(B) After January 31, 1955, and before August 5, 1964; or

(C) After May 7, 1975.

(Authority: 38 U.S.C. 3702, 3707)

(b) Veterans' educational assistance.—(1) Requirements for active duty servicemembers. VA will determine whether a veteran was discharged or released from active duty (as defined in § 5.22) because of a service-connected disability, or whether the official service department records show that the veteran had a service-connected disability at time of separation from service which in VA's medical judgment would have warranted discharge for disability, if either 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 the 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) Requirements for Selected Reserve servicemembers. VA will determine whether a veteran was discharged or released from service in the Selected Reserve for a service-connected disability or for a medical condition that preexisted the veteran's membership in the Selected Reserve and that VA determines is not service connected when the veteran applies for benefits under 38 U.S.C. chapter 30; and

(i) 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 that 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) Requirements for reservists. VA will determine whether a reservist has been unable to pursue a program of education due to a disability that 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 (b)(1) through (3) of this section are subject to the presumptions of soundness under §§ 5.244(a) and 5.245, based on service rendered after May 7, 1975.

(Authority: 10 U.S.C. 16133(b); 38 U.S.C. 3011(a)(1)(A)(ii), 3012(b)(1), 3202(1)(A))

CROSS REFERENCE: § 5.1, for the definition of "reservist". See 38 CFR part 21, for further information on veterans educational assistance.

§ 5.369 [Reserved]

Subpart F – Nonservice-Connected Disability Pensions and Death Pensions

IMPROVED PENSION REQUIREMENTS: VETERAN, SURVIVING SPOUSE, AND SURVIVING CHILD

§ 5.370 Definitions for Improved Pension.

(a) Adjusted annual income means countable annual income minus deductions described in § 5.413, rounded down to the nearest dollar.

(b) Annual Improved Pension amount means the annual amount of Improved Pension payable to a beneficiary, calculated as the maximum annual pension rate minus adjusted annual income.

(c) Countable annual income means payments of any kind from any source that are not specifically excluded under § 5.410, § 5.411, or § 5.412.

(d) Improved Pension means the nonservice-connected disability and death pension programs available to a new claimant beginning on January 1, 1979. It is a benefit payable to an eligible and entitled veteran as “Improved Disability Pension;” to a veteran’s surviving spouse or surviving child as “Improved Death Pension;” or to any of those beneficiaries as “special monthly pension.” Improved Pension is paid monthly or as provided in § 5.425, at rates set forth in §§ 5.390, 5.391, and 5.400.

(e) Improved Pension payment amount is the monthly payment calculated under § 5.421(a).

(f) Maximum annual pension rate means the amount of Improved Pension payable to a beneficiary whose adjusted annual income is zero. The maximum annual

pension rates are established by law. Maximum annual pension rates are described in § 5.400.

(g) Net worth means the value of real and personal property, as calculated under § 5.414.

(h) Payments are cash and cash equivalents (such as checks and other negotiable instruments), and the fair market value of personal services, goods, or room and board received in lieu of other forms of payment.

(i) Special monthly pension is a type of Improved Pension with higher maximum annual pension rates than the rates for Improved Pension and is payable to a claimant who is eligible for Improved Pension and who meets additional criteria in § 5.390 or § 5.391. References to Improved Disability Pension or Improved Death Pension also apply to special monthly pension, when such regulations set forth eligibility or entitlement requirements.

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

§ 5.371 Eligibility and entitlement requirements for Improved Pension.

(a) General rule. VA can only pay Improved Pension benefits, including, but not limited to, special monthly pension, to a beneficiary who is eligible and entitled to receive Improved Pension under this section.

(b) Eligibility requirements for Improved Disability Pension. A veteran is eligible for Improved Disability Pension if the veteran:

(1) Had wartime service under § 5.372; and

(2) Is either:

(i) Age 65 or older; or

(ii) Permanently and totally disabled under § 5.380.

(c) Eligibility requirements for Improved Death Pension. A surviving spouse or surviving child may be eligible for Improved Death Pension regardless of whether the veteran's death is service-connected. Eligibility is determined as follows:

(1) A surviving spouse is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372. For the requirements to establish status as a surviving spouse, see §§ 5.200 and 5.430.

(2) A surviving child is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372 and the child is not in the custody of a surviving spouse eligible to receive Improved Death Pension. For the requirements to establish status as a child and the custody rules for Improved Pension, see §§ 5.220(b) and 5.417.

(d) Entitlement requirements for Improved Disability or Death Pension. In addition to the eligibility requirements of paragraphs (b) and (c) of this section, a

claimant or beneficiary must meet the following income and net worth requirements to be entitled or to continue to be entitled to Improved Pension:

(1) Income. Adjusted annual income cannot be greater than the applicable maximum annual pension rate.

(2) Net worth. Net worth must not bar payment of Improved Disability or Death Pension, as provided in § 5.414.

(Authority: 38 U.S.C. 1513, 1521, 1522, 1541, 1542, 5303A)

§ 5.372 Wartime service requirements for Improved Pension.

(a) Wartime periods for Improved Pension. For dates of the periods of war, see § 5.20.

(b) Wartime service requirement for Improved Disability Pension. A veteran has "wartime service" for Improved Disability Pension purposes if he or she served in the active military service for one or more of the following periods:

(1) A period of 90 consecutive days or more, at least 1 day of which was during a period of war.

(2) 90 nonconsecutive days or more during a period of war. Separate periods of service within the same period of war can be added together to meet the 90-day requirement.

(3) A total of 90 days or more in 2 or more separate periods of service during more than 1 period of war.

(4) Any period of time during a period of war if:

(i) The veteran was discharged or released for a disability that VA later determines to be service-connected without presumptive provisions of law; or

(ii) Official service records show that the veteran had such a service-connected disability at the time of discharge that would have justified discharge.

(c) Wartime service requirement for Improved Death Pension. For Improved Death Pension claims, the veteran met the wartime service requirement if either of the following factors is true:

(1) The veteran had wartime service as specified in paragraph (b) of this section; or

(2) The veteran was, at the time of his or her death, receiving or entitled to receive disability compensation or military retired pay for a service-connected disability based on service during a period of war.

(Authority: 38 U.S.C. 1521(j), 1541(a), 1542)

§ 5.373 Evidence of age in Improved Pension claims.

Where the age of a veteran or surviving spouse is material to an Improved Pension claim, VA will accept as true the veteran's or surviving spouse's statement of age where it is consistent with all other statements of age in the record. If the record contains inconsistent statements of age, VA will use the youngest age of record unless

the veteran or surviving spouse can file documentation of an older age in one of the ways outlined in § 5.229.

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

§§ 5.374–5.379 [Reserved]

IMPROVED DISABILITY PENSION: DISABILITY DETERMINATIONS AND EFFECTIVE DATES

§ 5.380 Disability requirements for Improved Disability Pension.

(a) General rule. Unless a veteran has attained age 65, he or she must be permanently and totally disabled under this section in order to be eligible for Improved Disability Pension. In determining whether a veteran is permanently and totally disabled for Improved Pension purposes, VA will combine the disability ratings assigned to the veteran's nonservice-connected disability or disabilities with the ratings assigned to the veteran's service-connected disability or disabilities in the manner prescribed by the Schedule for Rating Disabilities in part 4 of this chapter.

(b) Presumption of permanent and total disability for certain veterans. A veteran is presumed permanently and totally disabled for Improved Disability Pension purposes if the veteran is:

(1) A patient in a nursing home for long-term care because of disability; or

(2) Determined disabled by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner.

(c) Factual determination that a veteran is permanently and totally disabled. Permanent and total disability ratings for Improved Disability Pension purposes are authorized for single disabilities, or combinations of disabilities, that are not the result of the veteran's willful misconduct, whether or not they are service connected. In addition to the criteria for determining total disability and permanency of total disability contained in § 5.284, the following special considerations apply in Improved Disability Pension cases:

(1) Congenital, developmental, hereditary, and familial conditions. A permanent and total disability pension rating will be authorized for a congenital, developmental, hereditary, or familial condition, if the other requirements for such a rating are met.

(2) Effective date. The permanence of total disability will be established as of the earliest date that is shown by the evidence. In cases where the claimant has been hospitalized, apply the following principles:

(i) The need for hospitalization lasting any period of time may be a proper basis for determining permanence. If VA cannot determine whether a disability was permanent before the beginning of a period of hospitalization, but evidence shows that the disability was permanent at some time during the hospitalization and has not improved after such time, VA will establish permanence beginning on the date of admission into the hospital. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(ii) In cases involving disabilities that require hospitalization for indefinite periods not otherwise established as permanently and totally disabling, VA will establish that the disability was permanent as of the date of admission into the hospital if the claimant is hospitalized for at least 6 months without improvement. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(iii) In cases involving active pulmonary tuberculosis not otherwise established as permanently and totally disabling, VA will establish that the disability was permanent as of the date of admission into the hospital if the claimant is hospitalized for at least 6 months without improvement. If such active pulmonary tuberculosis improves after 6 months of hospitalization, but is still diagnosed as active after 12 months of hospitalization, permanence will also be established as of the date of admission into the hospital. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(3) Veteran under age 40. In the case of a veteran under 40 years of age, permanence of total disability requires a finding that the end result of rehabilitation (that is, treatment for and adjustment to residual handicaps) will be permanent disability precluding more than marginal employment. Severe diseases and injuries, including, but not limited to, 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) Evidence of employability. The following elements will not be considered as evidence of employability:

(i) Employment as a member-employee or similar employment obtained only in competition with disabled persons; and

(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.

(5) Extra-schedular basis for Improved Pension. Where a veteran who fails to meet the disability requirements based on the percentage standards of the Schedule for Rating Disabilities in part 4 of this chapter is found to be unemployable due to disability, age, occupational background, and other related factors (such as level of education or vocational training), VA may approve on an extra-schedular basis a permanent and total disability rating for Improved Pension purposes.

(Authority: 38 U.S.C. 501(a), 1502(a), 1513, 1521(a), 1523(a), 1718(g))

CROSS REFERENCE: § 5.1, for the definitions of “nursing home” and “willful misconduct”.

§§ 5.381–5.382 [Reserved]

§ 5.383 Effective dates of awards of Improved Disability Pension.

(a) General effective date provisions. Except as provided in paragraph (b) or (c) of this section, the effective date of an award of Improved Disability Pension will be the later of either:

(1) The date of receipt of claim; or

(2) The date the veteran became eligible (by attaining age 65 or by becoming permanently and totally disabled) and entitled (by meeting the income and net worth requirements).

(b) Previously denied claims. If pension was previously claimed but was denied because the veteran's adjusted annual income was greater than the maximum annual pension rate, the effective date of an award of Improved Disability Pension will be the appropriate date under § 5.424.

(c) Retroactive award. The effective date of a retroactive award of Improved Disability Pension will be the date the veteran became permanently and totally disabled or the date of receipt of the pension claim, whichever is to the veteran's advantage, if all of the following elements are established:

(1) The veteran specifically requests a retroactive award;

(2) VA receives the claim for a retroactive award not more than 1 year after the date the veteran became permanently and totally disabled; and

(3) Due to disability, the veteran was unable to file a claim for at least the first 30 days after the date that the veteran became permanently and totally disabled. The disability preventing the veteran from filing a claim need not be the same disability that made the veteran permanently and totally disabled, and need not require extensive hospitalization, but a disability that requires extensive hospitalization is a disability that would prevent a veteran from filing a claim. A veteran will not be found to have been

unable to file a claim due to disability if the disability resulted from the veteran's willful misconduct.

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

CROSS REFERENCE: § 5.1, for the definition of "willful misconduct".

§§ 5.384–5.389 [Reserved]

SPECIAL MONTHLY PENSION ELIGIBILITY FOR A VETERAN AND SURVIVING SPOUSE

§ 5.390 Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance.

A veteran or surviving spouse who is eligible for Improved Pension may receive special monthly pension based on the need for regular aid and attendance if the claimant:

(a) Has 5/200 visual acuity or less in both eyes with corrective lenses;

(b) Has concentric contraction of the visual field to 5 degrees or less in both eyes;

(c) Is a patient in a nursing home because of mental or physical incapacity; or

(d) Establishes a factual need for regular aid and attendance under § 5.320.

(Authority: 38 U.S.C. 1502(b), 1521(d), 1541(d))

CROSS REFERENCE: § 5.1, for the definition of "nursing home".

§ 5.391 Special monthly pension for a veteran or surviving spouse at the housebound rate.

A veteran who is eligible for Improved Pension may receive special monthly pension at the housebound rate if he or she does not need regular aid and attendance and meets the criteria of paragraph (a) of this section. A surviving spouse who is eligible for Improved Pension may receive special monthly pension at the housebound rate if he or she does not need regular aid and attendance and meets the criteria of paragraph (b) of this section.

(a) Veteran with permanent and total disability. The veteran has a single, permanent disability rated 100 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter (determinations of unemployability under § 4.17 of this chapter do not qualify), and either:

(1) Has an additional disability or disabilities independently rated at 60 percent or more disabling under VA's Schedule for Rating Disabilities in part 4 of this chapter. The additional disability or disabilities must be separate and distinct from the disability

rated 100 percent disabling and must involve different anatomical segments or bodily systems than the disability rated 100 percent disabling; or

(2) Is "permanently housebound" because of disability or disabilities.

Permanently housebound means that the veteran is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will not improve during the veteran's lifetime.

(b) Surviving spouse. The surviving spouse is permanently housebound because of a disability or disabilities. The meaning of "permanently housebound" for a surviving spouse is the same as its meaning for a veteran in paragraph (a)(2) of this section.

(Authority: 38 U.S.C. 1502(c), 1513, 1521(e), 1541(e))

§ 5.392 Effective dates of awards of special monthly pension.

(a) The effective date of an award of special monthly pension will be the later of either:

(1) The effective date of the award of Improved Pension under § 5.383 or the award of Improved Death Pension under § 5.431; or

(2) The date entitlement to special monthly pension arose.

(b) Concurrent receipt of Improved Pension and Improved Death Pension. A veteran can receive Improved Pension in his or her own right and also be entitled to receive Improved Death Pension based on the need for aid and attendance as a surviving spouse. However, special monthly pension based on the need for regular aid and attendance is not payable to the surviving spouse while he or she is receiving hospital care as a veteran. VA will resume special monthly pension based on the need for regular aid and attendance effective the day that he or she was discharged or released from hospital care. See §§ 5.725 and 5.761.

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

§§ 5.393–5.399 [Reserved]

MAXIMUM ANNUAL PENSION RATES

§ 5.400 Maximum annual pension rates for a veteran, surviving spouse, or surviving child.

The maximum annual rates of Improved Pension for the following categories of beneficiaries are the amounts specified in 38 U.S.C. 1521, 1541, and 1542. The rates are higher if a veteran has a spouse or dependent child, or if a surviving spouse has custody of the child of the deceased veteran. To see the maximum annual rate for each category, see the authority citation under paragraphs (a) through (h) of this section. Current and historical maximum annual rates can be found on the Internet at

http://www.va.gov or are available from any Veterans Service Center or Pension Management Center. Whenever there is an increase in the rates listed in this section, VA will publish notice in the Federal Register.

(a) A veteran who is permanently and totally disabled or age 65 or older.

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

(b) A veteran who is housebound.

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

(c) A veteran who needs regular aid and attendance.

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

(d) Two veterans who are married to one another; combined rates.

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

(e) A surviving spouse.

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

(f) A surviving spouse who is housebound.

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

(g) A surviving spouse who needs regular aid and attendance.

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

(h) A surviving child of a deceased veteran, when the child has no custodian or is in the custody of an institution.

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

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.401 Automatic adjustment of maximum annual pension rates.

(a) Pension rates increase when Social Security benefits increase. VA will increase each maximum annual pension rate whenever there is a cost-of-living increase in Social Security benefit amounts under title II of the Social Security Act (42 U.S.C. 415(i)), which pertains to the Federal Old-Age, Survivors, and Disability Insurance Benefits program. VA will increase the maximum annual pension rates by

the same percentage as the Social Security increase, and the increase will be effective on the same date as the Social Security increase.

(b) New rates are published in the Federal Register. Whenever the maximum annual pension rates increase, VA will publish the new rates in the "Notices" section of the Federal Register.

(Authority: 38 U.S.C. 5312(a))

§§ 5.402–5.409 [Reserved]

IMPROVED PENSION INCOME, NET WORTH, AND DEPENDENCY

§ 5.410 Countable annual income.

(a) Time of receipt of income.—(1) Improved Disability Pension. For purposes of calculating countable annual income for Improved Disability Pension, VA does not include income received before the effective date of the veteran's award.

(2) Improved Death Pension. For purposes of calculating countable annual income for Improved Death Pension, VA does not include income received before the date of the veteran's death or income received before the effective date of the surviving spouse's or surviving child's award.

(b) Whose income is countable?—(1) Improved Disability Pension for a veteran. The income of a veteran includes the veteran's income and that of the veteran's dependent spouse, regardless of whether the spouse's income is available to the veteran. It also includes the income of each dependent child, subject to § 5.411.

(2) Improved Death Pension for a surviving spouse. The income of a surviving spouse includes the surviving spouse's income and the income of each dependent child of the deceased veteran in the surviving spouse's custody, subject to § 5.411.

(3) Improved Death Pension for a surviving child. The income of a surviving child includes the surviving child's income and may include the income of that child's custodian and the income of other surviving children, as described in § 5.435.

CROSS REFERENCE: See § 5.416, Persons considered as dependents for Improved Pension.

(c) Categories and counting of income. If there is more than one way to categorize income under paragraphs (c)(1) through (3) of this section, it will be categorized in the way that is most favorable to the claimant or beneficiary. Payments of any kind from any source will be counted as income during the reporting period in which it was received unless specifically excluded under this section, or § 5.411 or § 5.412. See § 5.420.

(1) Recurring income. Recurring income is income received or expected to be received in equal amounts and at regular intervals (for example, weekly, monthly, quarterly, etc.). There are two categories of recurring income:

(i) Long-term. Long-term recurring income continues for an entire reporting period. VA will count such income during the reporting period in which it was received. If the initial payment was received after the beginning of the reporting period, VA will count such income as received during the 12 month period starting on the first of the month after the initial payment was received. Thereafter, VA will count such income during the reporting period in which it is received.

(ii) Short-term. Short-term recurring income stops before it has been received for at least one full reporting period. VA will count such income as received during the 12 month period starting on the first of the month after the initial payment was received.

(2) Nonrecurring income. Nonrecurring income is income received or expected to be received on a one-time basis (for example, an inheritance). VA will count such income as received during the 12 month period starting on the first of the month after it was received.

(3) Irregular income. Irregular income is income received or expected to be received in unequal amounts or at different intervals during a reporting period. Irregular income is counted as follows:

(i) General rule. VA will count the first installment of irregular income as received during the 12 month period starting on the first of the month after it was received. Thereafter, VA will count irregular income for 12 months from the beginning of the reporting period in which it is received.

(ii) Overlapping irregular income. VA will count the lower amount of irregular income from the same source during any overlapping periods. However, if the irregular

income for the calendar year is zero, then VA will count the irregular income for the full 12 month period.

(d) Waived income. If a person waives income that cannot be excluded under § 5.412, VA must count the waived income. However, if the person withdraws a claim for Social Security benefits in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.

(e) Salary. Income from a salary is not determined by "take-home" pay. VA counts as income the gross salary (earnings or wages) without any deductions. However, an employer's contributions to health and hospitalization plans are not included in gross salary.

(f) Income-producing property. Income from real or personal property counts as income of the property's owner. This includes, but is not limited to, property acquired through purchase, gift, or inheritance.

(1) Proof of ownership. VA will consider the terms of the recorded deed or other evidence of title as proof of ownership.

(2) Income from jointly-owned property. Where a person owns property jointly with others, including, but not limited to, partnership property, VA will only count that portion of income produced by the property that represents the person's share of the ownership of the property.

NOTE TO PARAGRAPH (f)(2): If a beneficiary's income includes that of his or her spouse, and both the beneficiary and spouse are co-owners of a property that produces income, then income representing both co-owned shares is included as income to the beneficiary.

(3) Transfer of ownership with retention of income. If a person transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(g) Gambling income and losses. VA will deduct from gambling gross winnings any gambling losses to arrive at net gambling income. Only net gambling income is countable.

(Authority: 38 U.S.C. 501(a), 1503, 1521, 1541, 1542)

§ 5.411 Counting a child's income for Improved Pension payable to a child's parent.

(a) General rule. VA counts as income to the parent-beneficiary (that is, the veteran or surviving spouse receiving Improved Pension), the annual income of every child of the veteran who is in the parent-beneficiary's custody. However, the parent-beneficiary may file a claim to exclude all or part of the child's income. Upon receipt of such a claim, VA will provide the parent-beneficiary (claimant) with the proper application used to calculate the exclusion. The bases for exclusion are set forth in paragraphs (b) and (c) of this section.

(b) All or part of the child's income is not considered available for expenses necessary for reasonable family maintenance—(1) General rule. The parent-beneficiary may establish that all or part of the child's adjusted annual income is not available to meet the parent-beneficiary's expenses necessary for reasonable family maintenance. These expenses include food, clothing, health-care, shelter, and other expenses necessary to support a reasonable quality of life and cannot include expenses for items such as luxuries, gambling, and investments.

(2) Examples. The following are examples of common ways that a parent-beneficiary may establish that a child's income is not considered available. This is not an exclusive list:

(i) The child's income is being saved in an account for the child's education;

(ii) The child did not reside in the parent-beneficiary's household for all or part of the year;

(iii) The child's income is automatically routed into a trust account under a court order; or

(iv) The child lives with the parent-beneficiary, but the child's income is being received by someone outside of that parent's household.

(c) Counting a child's income would create a hardship. The parent-beneficiary may establish that counting all or part of the child's countable annual income, less any amount that is not available to the parent-beneficiary under paragraph (b) of this section, would result in hardship. The formula to calculate the amount of any hardship exclusion follows:

(1) Calculate the annual expenses necessary for reasonable family maintenance. Calculate the annual expenses necessary for reasonable family maintenance in accordance with paragraph (b)(1) of this section. The parent-beneficiary's annual expenses necessary for reasonable family maintenance cannot include expenses already deducted in determining the parent-beneficiary's or the child's adjusted annual income.

(2) Subtract the parent-beneficiary's adjusted annual income. Subtract from the annual expenses (paragraph (c)(1) of this section), the parent-beneficiary's adjusted annual income, as calculated under this part.

NOTE TO PARAGRAPH (c)(2): This number will include the child's adjusted annual income, because such income is countable to the parent-beneficiary with custody of such child under paragraph (a) of this section.

(3) Subtract any of the child's income that is not considered available. Subtract from the number calculated under paragraph (c)(2) of this section any of the child's income that was not reasonably available under paragraph (b) of this section.

(4) Subtract the annual Improved Pension amount. Subtract the parent-beneficiary's annual Improved Pension amount, which is the applicable maximum annual pension rate less the parent-beneficiary's adjusted annual income as calculated in paragraph (c)(2) of this section.

(5) The amount of hardship exclusion. (i) The amount of the hardship exclusion is the lesser of:

(A) The resulting amount in paragraph (c)(4) of this section; or

(B) The amount of the child's income that is considered available to the parent-beneficiary, that is, the child's adjusted annual income minus any amount calculated under paragraph (b) of this section.

(ii) If the amount of the hardship exclusion is zero or a negative number, then no hardship exclusion is permitted.

(6) Effective date of exclusion. The effective date of a hardship exclusion claim is determined in the same way as the effective date of pension awards under § 5.424.

(Authority: 38 U.S.C. 1503(a)(10), 1521, 1541)

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.412 Income exclusions for calculating countable annual income.

VA will not count income from the following sources when calculating countable income for Improved Pension:

(a) Items related to a child's earned income. A dependent child or a surviving child's earned income, which is current work income received during the reporting period, is countable for VA purposes. VA will deduct from such earned income the following amounts:

(1) The least amount of gross income for which an unmarried person must file a Federal Income Tax return if the person is not a surviving spouse or a head of household. For the law regarding this amount, see 26 U.S.C. 6012. For the definitions

of the terms “unmarried person”, “surviving spouse”, and “head of household” for purposes of this paragraph (c), see 26 U.S.C. 2(a) and (b), 7703. See also http://www.irs.gov.

(2) The amount that the child pays for educational expenses, if the child is pursuing post-secondary education or vocational rehabilitation, including, but not limited to, tuition, fees, books, and materials.

(Authority: 38 U.S.C. 1503(a)(10))

(b) Donations received. Donations received from public or private relief or welfare organizations, including, but not limited to:

(1) The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including, but not limited to, money paid to an institution for care due to a person’s impaired health or advanced age. However, if the maintenance is excluded as income under this provision, VA cannot deduct it as an unreimbursed medical expense under § 5.413.

(2) Benefits received under means-tested programs, for example, Supplementary Security Income payments.

(3) Payments from the VA Special Therapeutic and Rehabilitation Activities Fund for participating in VA-approved therapy or rehabilitation under 38 U.S.C. 1718, or in a program of rehabilitation which is conducted by a VA-approved State home and which conforms to the requirements of 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1503(a)(1), 1718(g)(3))

(c) Certain VA benefit payments. The following VA benefit payments:

(1) VA nonservice-connected disability or death pension payments, including, but not limited to, accrued benefits.

(2) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(Authority: 38 U.S.C. 1503(a)(2), 5310(b))

(d) Casualty loss reimbursement. Reimbursements of any kind (including insurance settlement payments) for expenses related to the repayment, replacement, or repair of equipment, vehicles, items, money, or property resulting from (1) any accident (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or reasonable replacement value of the equipment or vehicle involved at the time immediately preceding the accident;

(2) Any theft or loss (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or reasonable replacement value of the item or the amount of the money (including legal tender of the United States or of a foreign country) involved at the time immediately preceding the theft or loss; or

(3) Any casualty loss (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or

reasonable replacement value of the property involved at the time immediately preceding the casualty loss.

(Authority: 38 U.S.C. 1503(a)(5))

(e) Profit from sale of non-business property. Profit realized from the disposition of real or personal property other than in the course of a business. However, any amounts received in excess of the sales price, such as interest payments on deferred sales, will be counted as income. If payments are received in installments, the installments received will not begin to count as income until the total of installments received is equal to the sales price. The following exceptions apply:

(1) Bonds. If the redemption of a bond issued by a federal, state, municipal or other political entity is required for the payment of accrued interest, then the accrued interest payable is excluded from income.

(2) Life insurance. If the surrender of a life insurance policy is required to obtain the proceeds, then the interest received is excluded from income.

(Authority: 38 U.S.C. 1503(a)(6))

(f) Joint accounts. Amounts in joint accounts in banks or similar financial institutions acquired because of the death of the other joint owner.

(Authority: 38 U.S.C. 1503(a)(7))

(g) Survivor benefit annuity. Payments made by the Department of Defense to a qualified surviving spouse of a veteran who died before November 1, 1953. (This does not include Survivor Benefit Plan (SBP) annuity payments or SBP Minimum Income Widow(er)'s Annuity Plan payments, which count as income.)

(Authority: 10 U.S.C. 1448 note; Sec. 653(d), Pub. L. 100-456, 102 Stat. 1991)

(h) Radiation Exposure Compensation Act payments. Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(i) Ricky Ray Hemophilia Relief Fund payments. Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

(j) Energy Employees Occupational Illness Compensation Program payments. Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(k) Payments to Aleuts. Payments made to certain Aleuts under 50 U.S.C. app. 1989c-5.

(Authority: 50 U.S.C. app. 1989c-5(d)(2))

(l) Other amounts. The following incomes are excluded because VA does not consider them as "payments":

(1) Dividends from commercial insurance policies and cash surrender of life insurance to the extent that they represent return of premiums. However, interest earned is considered a payment.

(2) Income tax refunds.

(3) Interest on Individual Retirement Accounts that cannot be withdrawn without incurring a penalty.

(4) Interest on prepaid burial plans that is added to the value of the policy and is not available to the policy holder.

(5) Royalties received for extracting minerals.

(6) School scholarships and grants earmarked for specific educational purposes to the extent they are used for those purposes.

(7) Benefits payable but withheld, such as Social Security withheld to recoup an overpayment. This does not apply to VA benefits withheld to recoup an overpayment.

(8) Lump-sum proceeds of any life insurance policy on a veteran.

(m) Payments listed in § 5.706.

(n) State compensation for veterans. Payment of a monetary amount of up to $5,000 to a veteran from a State or municipality that is paid as a veterans benefit due to injury or disease.

(Authority: 38 U.S.C. 1503)

§ 5.413 Income deductions for calculating adjusted annual income.

(a) General rule. Except as otherwise provided in paragraph (c)(2)(iv) of this section, expenses and losses are deducted for the initial reporting period or the annual reporting period during which the expense was paid, regardless of when the expense was incurred. For the definitions of “initial reporting period” and “annual reporting period”, see § 5.420.

(b) Unreimbursed (out-of-pocket) medical expenses. VA will deduct from countable annual income unreimbursed (out-of-pocket) medical expenses (identified in paragraph (b)(2) of this section) that were paid within the reporting period, regardless of when the beneficiary incurred the debt, as specified in paragraph (b)(1) of this section. See § 5.707. For purpose of authorizing prospective Improved Pension payments, VA will accept a clear and reasonable estimate of expected future medical expenses, but such future expenses may be adjusted based on receipt of an amended estimate or of a

medical expense report. Improved Pension beneficiaries must report any change in medical expenses if they are claiming any medical expense deductions under this section.

(1) Amount of deductible unreimbursed medical expenses. VA will deduct unreimbursed (out-of-pocket) medical expenses that exceed 5 percent of the beneficiary's maximum annual pension rate that is in effect for the period(s) during which VA deducts the expenses. The maximum annual pension rate that VA uses for this calculation includes the maximum annual pension rates for an established dependent but does not include the maximum annual pension rates based on the need for regular aid and attendance or housebound status.

(2) Deductible unreimbursed medical expenses. In no case will VA deduct as a medical expense any "final expense" defined in paragraph (c) of this section. Subject to paragraph (b)(1) of this section, the following medical expenses are deductible:

(i) Improved Disability Pension. Amounts paid by the veteran or the veteran's dependent spouse for the unreimbursed medical expenses of the veteran; the veteran's dependent spouse; and any or all of the following persons who are also members or constructive members of the veteran's or dependent spouse's household: a child, a parent, or another relative for whom there is a moral or legal obligation of support.

(ii) Improved Death Pension: surviving spouse beneficiary. Amounts paid by the surviving spouse for both the surviving spouse's unreimbursed medical expenses and those of any or all of the following persons who are also members or constructive members of the surviving spouse's household: a child, a parent, or another relative for whom there is a moral or legal obligation of support.

(iii) Improved Death Pension: surviving child beneficiary. Amounts paid by a surviving child for the surviving child's unreimbursed medical expenses and those of a parent, brother, or sister.

(Authority: 38 U.S.C. 1503(a)(8))

(c) Final expenses.—(1) Definitions.—(i) Final expenses. For purposes of this section, "final expenses" are expenses paid by an Improved Pension beneficiary for a veteran's, spouse's, or child's last illness and burial. In Improved Death Pension cases, final expenses also include a veteran's just debts.

(ii) Last illness. For purposes of this section, last illness means the medical condition that was the primary or secondary cause of a person's death as indicated on the person's death certificate.

(iii) Veteran's just debts. For purposes of this section, a veteran's "just debts" are those debts that the veteran incurred or those debts that the veteran and spouse incurred jointly during the veteran's life. The term "just debts" does not include any debt that is secured by real or personal property.

(2) Final expenses that VA will deduct from countable annual income.—(i) Veteran awards. VA will deduct amounts paid by a veteran for the last illness and burial of the veteran's spouse or child, and amounts paid by a veteran's spouse for the last illness and burial of the veteran's child.

(ii) Surviving child awards. VA will deduct amounts paid by a surviving child for the veteran's final expenses.

(iii) Surviving spouse awards. VA will deduct amounts paid by a surviving spouse for the final expenses of the veteran or the veteran's child.

(iv) Surviving spouse's prior payments of veteran's last illness expenses. VA will deduct amounts reported during the surviving spouse's initial reporting period if:

(A) The amounts were paid by the surviving spouse before the veteran's death for the veteran's last illness;

(B) The surviving spouse made the payments no earlier than 1 year before the veteran died; and

(C) VA received the surviving spouse's Improved Death Pension claim no later than 1 year after the veteran's death.

(3) Final expenses that VA will not deduct from countable annual income. VA will not deduct final expenses from a beneficiary's countable annual income if:

(i) The expenses are reimbursed under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits); or

(ii) The expenses of a veteran's last illness were allowed as a medical expense deduction on the veteran's pension or parents' dependency and indemnity compensation (DIC) account during the veteran's lifetime.

(Authority: 38 U.S.C. 1503(a)(3), (4))

(d) Educational expenses. VA will deduct educational expenses from a veteran's or surviving spouse's countable annual income. Educational expenses means payments a veteran or surviving spouse makes for his or her course of education,

vocational rehabilitation, or training. It includes, but is not limited to, tuition, fees, books, and materials. If the veteran or surviving spouse needs regular aid and attendance, it also includes unreimbursed unusual transportation expenses associated with the pursuit of the course of education, vocational rehabilitation, or training. VA considers transportation expenses "unusual" if they are greater than the amount a person without a disability would reasonably spend on an appropriate means of transportation (public transportation, if reasonably available). Educational expenses that are reimbursed by scholarships or grants are not deductible.

See also § 5.412(a)(2) (concerning deducting a child's educational expenses from his or her earned income).

(Authority: 38 U.S.C. 1503(a)(9))

(e) Expenses and awards or settlements for death or disability. VA will deduct from income received based on an award or settlement for death or disability any medical, legal, or other expenses that are incident to such death or disability or are incident to the collection or recovery of such an award or settlement. However, medical expenses cannot be deducted under this paragraph (e) if they are paid after the date that the award or settlement payment was received. Medical expenses paid after that date may be deducted under paragraph (b) of this section as unreimbursed medical expenses. VA will not deduct the same medical expenses under paragraph (b) of this section that it deducts under this paragraph (e). For purposes of this paragraph (e), the award or settlement may be received from any of the following sources:

(1) Commercial insurance proceeds (disability, accident, life, or health);

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any worker's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

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

(f) Business, farm, or professional practice—(1) Necessary operating expenses. VA will deduct from income produced by a business, farm, or professional practice the necessary operating expenses (such as the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements) of that business, farm, or professional practice. Only the net of such income is countable. The value of an increase in stock inventory of a business is not income.

(2) Depreciation. Depreciation of a business, farm, or professional practice is not deductible from income produced by that business, farm, or professional practice.

(3) Business and investment losses. Losses sustained in operating a business, farm, or professional practice, or from transactions involving investment property, may be deducted only from income derived from the source that sustained the loss.

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

§ 5.414 Net worth determinations for Improved Pension.

(a) How to calculate net worth—(1) General formula. For Improved Pension purposes, net worth is the market value of all real and personal property owned by the claimant or beneficiary or listed under paragraph (c) of this section, minus mortgages or other encumbrances on such property.

(2) Establishing ownership of an asset. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset.

(i) Property given to a relative. If a claimant or beneficiary gives property to a relative living in the same household, VA will include the value of the property as part of the claimant's or beneficiary's net worth. This also applies if the claimant or beneficiary sells the property to a relative in the same household at such a low price that it amounts to a gift.

(ii) Property given to a non-relative. If a claimant or beneficiary gives property to someone other than a relative living in the same household, VA will include the value of the property as net worth unless the claimant or beneficiary has given up all rights of ownership, including, but not limited to, the right to control the property.

(b) Property excluded from net worth. Net worth does not include the following elements:

(1) Value of the primary residence (single-family unit), which also includes a reasonably sized lot. The primary residence will not be included as net worth simply because the veteran has moved into a nursing home.

(i) Personal mortgage not deductible from net worth. Because the value of a primary residence is not considered, VA will not subtract from net worth under paragraph (a) of this section the amount of any mortgages or encumbrances on such property.

(ii) Reasonably sized lot defined. VA will evaluate a "reasonably sized lot" by considering the size of other residential lots in the vicinity. If the residential lot is larger than other such lots in the vicinity, VA will exclude only the value of the reasonably sized lot and include the value of the rest of the lot as part of net worth. If the real property is a farm, VA will exclude the value of a reasonably sized lot, including the residence area, and consider the rest of the farm as part of net worth.

(2) Value of personal effects suitable to and consistent with a reasonable mode of life, such as appliances and family transportation vehicles.

(3) Child educational exclusion. When calculating a child's net worth, whether as a dependent or as a claimant (surviving child), VA will exclude reasonable amounts for actual or estimated future educational or vocational expenses. VA will exclude only the amount needed to cover the child's educational or vocational expenses until he or she reaches age 23.

(4) Radiation Exposure Compensation Act payments. Payments made under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(5) Ricky Ray Hemophilia Relief Fund payments. Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

(6) Energy Employees Occupational Illness Compensation Program payments. Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(7) Payments to Aleuts. Payments made to certain Aleuts under 50 U.S.C. App. 1989c-5.

(Authority: 50 U.S.C. App. 1989c-5(d)(2))

(8) Other payments. Other payments excluded from net worth listed in § 5.706.

(c) Net worth of relatives of the claimant or beneficiary counted as net worth.

(1) Veteran. The veteran's net worth includes the net worth of his or her spouse.

(2) Surviving spouse. The surviving spouse's net worth only includes the net worth of the surviving spouse.

(3) Surviving child—(i) Surviving child without a custodian or institutionalized. If a surviving child has no custodian or is in the custody of an institution, VA will consider only the child's net worth and adjusted annual income when determining whether net worth is a bar to Improved Death Pension under paragraph (d) of this section.

(ii) Surviving child living with a custodian. If the surviving child has a custodian other than an institution, the child's net worth includes that person's net worth. If the child is in joint custody as provided in § 5.417(b), the child's net worth includes both custodians' net worth.

(d) How net worth bars an award of Improved Pension.—(1) General rule. VA cannot pay Improved Pension if it is reasonable to expect that part of the claimant's or beneficiary's net worth, as calculated under this section, should be used for the claimant's living expenses. This applies to new claims for, and to ongoing entitlement to, Improved Pension. Generally, when net worth is $80,000 or more, it is reasonable to expect that part of the net worth should be used for living expenses. Generally, when net worth is less than $80,000, it is not reasonable to expect that part of the net worth should be used for living expenses. However, there may be exceptions to the guidelines stated in this paragraph (d) based on the facts of each case.

(2) Relevant factors. The following factors are considered in determining whether it is reasonable to expect that part of the net worth should be used for the claimant's or beneficiary's living expenses:

(i) The adjusted annual income and the adjusted annual income of any person whose net worth is considered part of the claimant's or beneficiary's net worth.

(ii) Living expenses. However, in considering the claimant's or beneficiary's living expenses, VA cannot consider expenses it excluded or deducted in determining adjusted annual income.

(iii) The average life expectancy for a person of the same age as the claimant or beneficiary and the potential rate of depletion of net worth.

(iv) The value of liquid assets (assets that the claimant or beneficiary can readily convert into cash).

(v) The number of family members (as defined in § 5.300) who depend on the claimant or beneficiary for support.

(e) How a veteran's child's net worth affects an Improved Pension award to a parent who has custody of that child. A veteran's child's net worth affects an Improved Pension award to a parent who has custody of that child. If a child's net worth is such that under all circumstances, including consideration of the veteran's or surviving spouse's adjusted annual income, it is reasonable to expect that part of the child's net worth be consumed for the child's maintenance, such a child will not be considered a dependent for Improved Pension.

(Authority: 38 U.S.C. 1522, 1543)

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.415 Effective dates of changes in Improved Pension benefits based on changes in net worth.

(a) Effective date of reduction or discontinuance of Improved Pension award when net worth increases—(1) Beneficiary. If an increase in a beneficiary's net worth requires VA to discontinue Improved Pension, VA will discontinue the Improved Pension award effective the first day of the year after the year that net worth increased.

(2) Child. If an increase in a child's net worth requires VA to reduce or discontinue that child's dependency under § 5.414(e), VA will adjust the payment amount effective the first day of the year after the year that net worth increased.

(Authority: 38 U.S.C. 5112(b)(4)(B))

(b) Claims previously denied or awards previously discontinued because of net worth. When a claim for Improved Pension has been denied, or an award of Improved Pension has been reduced or discontinued, due to excessive net worth, a claimant or former beneficiary may reapply for Improved Pension if there is a reduction in net worth. See § 5.414(d). If net worth ceases to be a bar before the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be the date that net worth ceased to be a bar. If net worth ceases to be a bar after the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be assigned under § 5.383 or § 5.431.

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

CROSS REFERENCE: § 5.57, Claims definitions.

§ 5.416 Persons considered as dependents for Improved Pension.

(a) Factors for a veteran's dependent spouse. A veteran's spouse is a dependent spouse for Improved Disability Pension purposes if at least one of the following factors applies:

(1) The veteran lives with the spouse;

(2) The veteran and the spouse live apart but are not estranged; or

(3) The veteran and the spouse live apart and are estranged, but the veteran provides reasonable contributions to the spouse's support. Whether support contributions are reasonable is a factual matter that VA determines.

(b) Factors for a dependent child. Unless paragraph (c) of this section applies, a child is a dependent child for Improved Pension purposes if at least one of the following factors applies:

(1) The child is in the veteran's or surviving spouse's custody; or

(2) The veteran provides reasonable contributions to the child's support. Whether support contributions are reasonable is a factual matter that VA determines.

(c) When a child's net worth bars dependency status. If a child's net worth is a bar, under § 5.414(e), to payment of additional Improved Pension for that child, then that child is not a dependent child for Improved Pension purposes.

(Authority: 38 U.S.C. 1521, 1522(b), 1541, 1543(a)(2))

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.417 Child custody for purposes of determining dependency for Improved Pension.

For purposes of Improved Pension:

(a) Presumption of custody. A child's natural or adoptive parent, or a person or institution with legal responsibility for that child, is presumed to be the child's custodian unless there has been a legal determination removing custody.

(b) Presumption of joint custody. If a child's natural or adoptive parent is married to someone other than the child's other natural or adoptive parent, the child is presumed to be in the joint custody of the natural or adoptive parent and stepparent unless:

(i) The child's stepparent and natural or adoptive parent are estranged and living apart; or

(ii) Custody is legally removed from the natural or adoptive parent.

(c) Custody retained after the age of majority. A child over age 18 is presumed to remain in the custody of the person whose custody the child was in before attaining age 18, unless custody is legally removed. This applies without regard to whether a child has reached the age of majority under applicable State law. This also applies without regard to whether the child was eligible for pension before age 18, or whether increased pension was payable to a veteran or surviving spouse for the child before the child's 18th birthday.

(d) Successor custodian after the age of majority. If a child's custodian dies after the child's 18th birthday, VA will presume that the child is in the custody of a successor custodian, but if there is no successor custodian, the child may be eligible for benefits in his or her own right.

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

CROSS REFERENCE: § 5.1, for the definitions of "custody of a child" and "State".
§ 5.220(b)(2), Status as a child for benefit purposes, (enumerating situations in which a person is recognized as a child after attaining age 18).

§§ 5.418–5.419 [Reserved]

IMPROVED PENSION: INCOME REPORTING PERIODS, PAYMENTS, EFFECTIVE DATES, AND TIME LIMITS

§ 5.420 Reporting periods for Improved Pension.

When calculating adjusted annual income, VA counts income that is reported by a claimant or beneficiary during a "reporting period." A "reporting period" is a time period established by VA during which a claimant or beneficiary must report to VA all income, net worth, and adjustments to income. However, the claimant or beneficiary may report a change in income or net worth when the change occurs. There are two types of reporting periods: the initial reporting period and the annual reporting period.

(a) Initial reporting period—(1) General rule. Except as provided in paragraphs (a)(2) and (3) of this section, the initial reporting period begins on the latest of the following dates:

(i) The date VA receives a pension claim;

(ii) The date VA receives an election under § 5.460 or § 5.463; or

(iii) The date the claimant becomes eligible to receive Improved Pension.

(2) Retroactive awards. For Improved Pension claims where an effective date before the date of claim is assigned pursuant to § 5.383(b), the initial reporting period begins on the date the veteran became permanently and totally disabled if that would be to the veteran's advantage. If it would not be to the veteran's advantage, then the initial reporting period begins on the date of the pension claim.

(3) Improved Death Pension claim received no later than 1 year after date of veteran's death. When VA receives an Improved Death Pension claim no later than 1 year after the date of the veteran's death, the initial reporting period begins on the day

that the veteran died. This is true even though the effective date under § 5.695 is the first day of the month of death. See § 5.431 for effective dates and rule applicability.

(4) End of period. The initial reporting period ends 1 year after the last day of the month in which the period began.

(b) Annual reporting period. For Improved Pension purposes, the annual reporting period is each calendar year. The first annual reporting period is the calendar year in which the initial reporting period ends.

(Authority: 38 U.S.C. 1506, 1521, 1541,1542)

§ 5.421 How VA calculates an Improved Pension payment amount.

(a) How VA calculates a monthly Improved Pension payment amount. To calculate the monthly Improved Pension payment amount, VA divides the annual Improved Pension amount by 12 and rounds down to the nearest whole dollar.

(b) Changes in maximum annual pension rate. When there is a change in a beneficiary's maximum annual pension rate (because of a cost-of-living adjustment or some other reason), VA recalculates the annual Improved Pension amount using the new maximum annual pension rate and the amount of adjusted annual income on the effective date that the maximum annual pension rate changes. VA then determines the new monthly payment amount as specified in paragraph (a) of this section.

(c) Changes in adjusted annual income. If a beneficiary's adjusted annual income increases or decreases, VA recalculates the annual Improved Pension amount using the new adjusted annual income amount. VA then determines the new monthly payment amount as specified in paragraph (a) of this section. See § 5.422.

(Authority: 38 U.S.C. 1521, 1541, 1542, and 5123)

§ 5.422 Effective dates of changes to annual Improved Pension payment amounts due to a change in income.

(a) Effective dates of changes to payment amounts due to a change in income—

(1) Increased annual Improved Pension amount. If an income change requires an increased annual Improved Pension amount, the effective date of the increased amount is the date that the income changes, subject to § 5.424. However, VA generally cannot pay an increased amount of Improved Pension based on a change in income until the first day of the month after such an income change. See § 5.693 (concerning dates for increased payments and exceptions).

(2) Reduced annual Improved Pension amount or discontinuance of Improved Pension. If an income change requires a reduction of an annual Improved Pension amount or the discontinuance of Improved Pension, the effective date of the reduced amount or discontinuance is the first day of the month after the income change.

(b) Effective dates for counting income of a dependent.—(1) Dependent removed from Improved Pension award. VA will stop counting a dependent's income on the same date it removes the dependent from the Improved Pension award.

(2) Added dependent increases Improved Pension award. If a beneficiary gains a dependent and this results in an increased annual Improved Pension amount, the effective date of the increase will be the date of the addition of the dependent if the evidence showing the dependency is received no later than 1 year after the addition of the dependent. If such evidence is not received within 1 year after the addition of the dependent, then the effective date will be the date such evidence is received.

(3) Loss of a dependent increases Improved Pension award. If a beneficiary loses a dependent and this results in an increased annual Improved Pension amount, the effective date of the increase will be the date VA receives notice of the loss of the dependent if the evidence showing the loss of a dependent is received no later than 1 year after of the loss of the dependent. If such evidence is not received within 1 year after the loss of the dependent, then the effective date will be the date such evidence is received.

(Authority: 38 U.S.C. 501(a), 5110, 5112)

CROSS REFERENCE: § 5.177(g), Effective dates for reducing or discontinuing a benefit payment or for severing service connection, (concerning reducing or discontinuing pension payments because of a change in disability or employability status).

§ 5.423 Improved Pension determinations when expected annual income is uncertain.

(a) Uncertain expected annual income. Expected annual income is the annual income a claimant or beneficiary anticipates receiving during a given reporting period. If a claimant or beneficiary is uncertain about the amount of his or her expected annual income or if there is evidence indicating more expected annual income than the amount reported by the claimant or beneficiary, VA will take all of the following actions:

(1) Count the greatest amount of expected annual income the claimant or beneficiary estimates or that is indicated by the evidence and adjust or pay benefits based on that amount. If that amount is greater than the maximum annual pension rate, Improved Pension will not be paid;

(2) Send notice to the claimant or beneficiary concerning the time limit provisions of § 5.424; and

(3) Adjust or pay benefits when complete income information is received, according to the provisions of § 5.424.

(b) Uncertain dependent information. If a dependent's expected annual income is greater than the difference between the increased maximum annual pension rate based on the addition of the dependent and the maximum annual pension rate without the dependent, but the claimed dependent's relationship has not yet been established by required evidence, VA will take the following actions:

(1) Determine the maximum annual pension rate without consideration of the claimed dependent;

(2) Count the claimed dependent's income as income of the claimant or beneficiary for purposes of determining entitlement to Improved Pension and determining the annual Improved Pension amount; and

(3) Adjust the annual Improved Pension amount using the applicable maximum annual pension rate when evidence necessary to establish the dependent's relationship has been received. (For the evidence necessary to establish dependency, see Subpart D of this part.)

(Authority: 38 U.S.C. 501(a), 1503)

§ 5.424 Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.

(a) Scope. If a claimant (including any former beneficiary) or beneficiary submits additional evidence within the time limits in this section, then VA may award or increase benefits for prior periods as set forth in this section.

(b) Expected or actual income—(1) Pension not paid. When VA does not award pension based on actual or expected adjusted annual income during the initial reporting period, the claimant may submit evidence that supports entitlement for all or part of that period. If the claimant submits additional evidence on or before December 31 of the calendar year after the calendar year in which the initial reporting period ends, VA may award benefits effective from the beginning of the initial reporting period, subject to the provisions of § 5.383 or § 5.431. If the claimant does not submit evidence of entitlement

within this time limit, VA may only pay benefits effective from the date it receives a new claim.

(2) Pension paid at a lower amount or discontinued. When VA pays pension at a lower amount or discontinues pension benefits for all or part of a reporting period based on the claimant's or beneficiary's actual or expected adjusted annual income, the claimant (including any former beneficiary) or beneficiary may submit evidence that supports entitlement or increased entitlement for all or part of that period. If the claimant or beneficiary submits additional evidence on or before December 31 of the calendar year after the calendar year in which the reporting period ends, VA may award, resume, or increase benefits effective from the date entitlement arose but not earlier than the beginning of the reporting period. If the claimant or beneficiary does not submit evidence of entitlement within this time limit, VA may only pay or increase benefits effective from the date it receives a new claim, except as provided in paragraph (c) or (d) of this section.

(c) Payment following nonentitlement for one reporting period. This paragraph (c) applies if the claimant (including any former beneficiary) or beneficiary's adjusted annual income does not permit payment for the initial reporting period or requires VA to discontinue payment for an entire reporting period. In such cases, VA may award Improved Pension effective the date entitlement arose but not earlier than the beginning of the next reporting period (the new initial reporting period), if the claimant or beneficiary submits evidence before that reporting period ends. If the claimant or beneficiary does not submit evidence of entitlement within this time limit, VA may only

pay benefits effective the date it receives a new claim, except as provided in paragraph (d) of this section.

(d) No time limit to submit income evidence to reduce overpayment. Solely for purpose of reducing an overpayment, there is no time limit to submit income evidence, including, but not limited to, deductible expenses. However, the evidence submitted must relate to the initial or annual reporting period for which the overpayment was created.

(Authority: 38 U.S.C. 501(a), 5110(h))

§ 5.425 Frequency of payment of Improved Pension benefits.

VA issues payments of Improved Pension as provided in this section. Except as provided in paragraph (e) of this section, a beneficiary may choose to receive monthly payments if other Federal benefits would be denied because pension payments are issued less frequently than monthly.

(a) Monthly if $228 or more. VA will make a payment every month if the annual Improved Pension amount is $228 or more.

(b) Every 3 months if at least $144 but less than $228. VA will make a payment every 3 months if the annual Improved Pension amount is at least $144 but less than

$228. Payment dates will be on or about March 1, June 1, September 1, and December 1.

(c) Every 6 months if at least $72 but less than $144. VA will make a payment every 6 months if the annual Improved Pension amount is at least $72 but less than $144. Payment dates will be on or about June 1 and December 1.

(d) Once a year if less than $72. VA will make a payment once a year if the annual Improved Pension amount is less than $72. The payment date will be on or about June 1.

(e) Payments of less than one dollar are not made. VA will not make a payment of less than one dollar.

(Authority: 38 U.S.C. 1508)

§§ 5.426–5.429 [Reserved]

IMPROVED DEATH PENSION MARRIAGE DATE REQUIREMENTS AND EFFECTIVE DATES

§ 5.430 Marriage date requirements for Improved Death Pension.

A surviving spouse may qualify for Improved Death Pension if the marriage to the veteran occurred before or during his or her service or, if the marriage meets one of the following criteria:

(a) The veteran and surviving spouse were married for 1 year or more (multiple marriage periods may be added together to meet the 1-year requirement).

(b) A veteran of one of the following wartime periods and the surviving spouse were married before one of the following delimiting dates:

(1) World War II: January 1, 1957.

(2) Korean Conflict: February 1, 1965.

(3) Vietnam Era: May 8, 1985.

(4) Persian Gulf War: January 1, 2001.

(c) A child was born of the marriage or born to them before the marriage.

(Authority: 38 U.S.C. 103(b), 1541(f))

CROSS REFERENCE: § 5.1(j), for the definition of “child born of the marriage” and “child born before the marriage”.

§ 5.431 Effective dates of Improved Death Pension.

(a) Nonservice-connected death after separation from service—(1) Claim received no later than 1 year after the date of death. If VA awards Improved Death Pension based on a claim received no later than 1 year after the date of the veteran's death, the effective date of the award is the first day of the month in which the death occurred.

(2) Claim received more than 1 year after the date of the veteran's death. If VA awards Improved Death Pension based on a claim received more than 1 year after the date of the veteran's death, the effective date of the award is the date VA received the claim.

(b) Death in service. The following effective dates apply for Improved Death Pension awards based upon a veteran's death in service:

(1) Claim received no later than 1 year after death. If VA receives a claim for Improved Death Pension no later than 1 year after the date of death fixed by the veteran's service branch's report or finding of actual or presumed death, the effective date is the first day of the month that the Secretary concerned establishes as the date of death.

(2) Claim received later than 1 year after death. If VA receives the claim later than 1 year after the date of death provided in paragraph (b)(1) of this section, the effective date is the date VA receives the claim.

(3) Death benefits not to be paid concurrently with military benefits. VA will not pay benefits to a claimant on a report of actual death for periods that the claimant has

received, or was entitled to receive, any of the following military entitlements of the veteran:

(i) An allowance;

(ii) An allotment; or

(iii) Service pay.

(Authority: 38 U.S.C. 5110(a), (d), (j))

§ 5.432 Deemed valid marriages and contested claims for Improved Death Pension.

(a) Definition of contested claim. For purposes of this section, a claim is a "contested claim" when claims are filed both by a claimant seeking recognition as a deemed valid surviving spouse under § 5.201, and by a surviving spouse eligible for Improved Death Pension.

(b) VA adjudication of contested claims. VA will take the following steps in adjudicating a contested claim:

(1) Develop the claims of both the surviving spouse and the claimant seeking recognition as the surviving spouse; then

(2) Afford each claimant the applicable time period provided in § 5.424(b) to show his or her adjusted annual income is less than the maximum annual pension rate; and then

(3) If the surviving spouse does not establish entitlement to Improved Death Pension before the end of the applicable time limit under § 5.424(b), VA will recognize

the claimant seeking recognition as a surviving spouse of a deemed valid marriage and award Improved Death Pension if that claimant meets eligibility and entitlement requirements. If the surviving spouse later claims Improved Death Pension and establishes entitlement, VA will then process the claim under § 5.433.

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

§ 5.433 Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.

(a) Purpose. This section applies when VA is paying Improved Death Pension to a surviving spouse (identified in this section as "former surviving spouse") and another claimant (identified in this section as "new surviving spouse") establishes that he or she is the true surviving spouse eligible to receive Improved Death Pension.

(b) Effective date of discontinuance of payments to former surviving spouse—(1) Discontinuance date of the award to the former surviving spouse where the award to the new surviving spouse is effective before the date VA received the new surviving spouse's claim. If benefits are payable to the new surviving spouse from a date before the date VA received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the date of the award to the new surviving spouse.

(2) Discontinuance date of the award to the former surviving spouse where award to the new surviving spouse is effective the date VA received the new surviving spouse's claim. If benefits are payable to the new surviving spouse from the date VA

received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the later of the following dates:

(i) The date of receipt of the new surviving spouse's claim; or

(ii) The first day of the month after the month VA last paid benefits.

(3) Exception where discontinuances are due to a change in, or change in interpretation of, the law or an administrative issue. When VA must discontinue payments to a former surviving spouse because of a change in the law or an administrative issue or because of a change in the interpretation of the law or an administrative issue, VA will discontinue the award to the former surviving spouse effective the first day of the month after the end of the 60-day notice period to the former surviving spouse concerning the discontinuance.

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

§ 5.434 Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.

(a) Custodian of child establishes eligibility as surviving spouse. When VA finds Improved Death Pension eligibility for the custodian of a child receiving Improved Death Pension, VA will award Improved Death Pension to the surviving spouse and discontinue the child's eligibility for Improved Death Pension as follows:

(1) Annual Improved Pension amount for surviving spouse higher than amount for child.—(i) Effective date. If the surviving spouse is entitled to a higher Improved

Pension payment amount than the child was receiving, the surviving spouse's pension award is effective the date provided by § 5.431.

(ii) Initial amount payable. The initial pension amount payable to the surviving spouse is the difference between the child's Improved Pension payment amount and the surviving spouse's Improved Pension payment amount. VA will pay to the surviving spouse the full Improved Pension payment amount effective the first day of the month after the month VA last paid benefits to the child. VA will discontinue the child's pension award effective that same day.

(2) Annual Improved Pension amount for surviving spouse equal to or less than amount for child. When the child is receiving an Improved Death Pension payment amount equal to or higher than the Improved Death Pension payment amount that the surviving spouse is entitled to receive, VA will pay Improved Death Pension to the surviving spouse effective the first day of the month after the month VA last paid benefits to the child, and discontinue the child's pension award effective that same day. Section 5.693 does not apply in such a situation.

(3) Discontinuance of child's pension award when the surviving spouse is not entitled to payments. When a surviving spouse establishes eligibility for Improved Death Pension but is not entitled because his or her adjusted annual income is greater than the maximum annual pension rate or because his or her net worth bars entitlement, VA will discontinue the child's pension award effective the first day of the month after the month VA last paid benefits to the child.

(b) Child establishes eligibility but surviving spouse has received Improved Death Pension payments after his or her eligibility ended. If a surviving spouse continued to receive Improved Pension payments after becoming ineligible for Improved Pension, and that surviving spouse has custody of a child who establishes eligibility for Improved Pension payments, VA will award Improved Pension to the child and discontinue the surviving spouse's eligibility as follows:

(1) Improved Pension payment amount for the child is lower than the payment amount for the former surviving spouse. If the surviving spouse receives Improved Pension after his or her eligibility ends, and his or her custodial child is entitled to a reduced Improved Pension payment, then VA will take the following actions:

(i) Amend the award to surviving spouse. VA will amend the award to the surviving spouse for the period before the award to the child is effective by reducing the Improved Pension payment amount to the amount that would have been paid to the child, establishing a debt owed by the surviving spouse to VA. The surviving spouse's reduced payment is effective the date the Improved Pension payment to the spouse should have been discontinued.

(ii) Award Improved Pension to child. VA will award Improved Pension at the reduced rate to the child effective the first day of the month after the month VA last paid benefits to the surviving spouse, discontinuing the surviving spouse's pension award effective that same day. Section 5.693 does not apply in such a situation.

(2) The Improved Pension payment amount for the child is equal to or higher than the former surviving spouse's amount. If the surviving spouse receives Improved

Pension after his or her eligibility ends, and his or her custodial child is entitled to an equal or increased pension payment then VA will take the following actions:

(i) Partial payment to the child. VA will pay the child the difference between the child's pension payment amount and the surviving spouse's pension payment amount. The effective date of the child's benefits is the date VA should have discontinued the surviving spouse's pension benefits.

(ii) Full payment to the child. VA will grant Improved Pension at the equal or increased rate to the child effective the first day of the month after the month VA last paid benefits to the surviving spouse, discontinuing the surviving spouse's pension award effective that same day.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.435 Calculating annual Improved Pension amounts for a surviving child.

(a) Surviving child not in custody or in the custody of an institution. If a surviving child has no custodian, or a surviving child is in the custody of an institution, VA calculates the surviving child's annual Improved Pension amount by subtracting the surviving child's adjusted annual income from the surviving child's maximum annual pension rate.

(b) Surviving child in the custody of a person legally responsible for the child's support—(1) One surviving child in the custody of a person legally responsible for the child's support. If the surviving child has a custodian, the surviving child's annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and one dependent surviving child, reduced by the adjusted annual income of the surviving child and that of the surviving child's custodian; or

(ii) The maximum annual pension rate for a surviving child alone, reduced by the surviving child's adjusted annual income.

(2) More than one surviving child in the custody of a person legally responsible for the child's support. If multiple surviving children have the same custodian and any surviving child has adjusted annual income equal to or greater than the maximum annual pension rate for one surviving child, that surviving child (and the surviving child's income) is not included in the calculation of the annual Improved Pension amount. The remaining surviving child's annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children and that of the custodian; or

(ii) The maximum annual pension rate for a surviving child alone times the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children.

(3) Income of natural or adoptive parent includes that of natural or adoptive parent's spouse. If the custodian listed in paragraph (b)(1) or (2) of this section is a

natural or adoptive parent of a surviving child who is in joint custody as provided in § 5.417(b), the income of that natural or adoptive parent includes the income of that natural or adoptive parent's spouse.

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

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§§ 5.436–5.459 [Reserved]

CHOOSING IMPROVED PENSION OVER OTHER VA PENSION PROGRAMS

§ 5.460 Definitions of certain VA pension programs.

(a) Section 306 Pension means the nonservice-connected disability and death pension programs available to a new claimant during the period beginning on July 1, 1960, and ending on December 31, 1978.

(b) Old-Law Pension means the nonservice-connected disability and death pension programs available to a new claimant before July 1, 1960.

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

§§ 5.461–5.462 [Reserved]

§ 5.463 Effective dates of Improved Pension elections.

An election to receive Improved Pension is effective on the date VA receives the election.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.464 Multiple pension benefits not payable.

If a veteran is entitled to Improved Pension on the basis of his or her service and is also entitled to pension under any other VA pension program based on another person's service, VA will pay only the greater benefit.

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

§§ 5.465–5.469 [Reserved]

CONTINUING ENTITLEMENT TO OLD-LAW PENSION OR SECTION 306 PENSION

§ 5.470 Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension.

(a) Discontinuances. Old-Law Pension or Section 306 Pension will be discontinued for any one of the following reasons:

(1) A veteran pension beneficiary ceases to be permanently and totally disabled;

(2) A surviving spouse pension beneficiary no longer meets the definition of "surviving spouse", as provided in § 5.200;

(3) A child pension beneficiary no longer meets the definition of "child", as provided in § 5.220;

(4) A pension beneficiary's income exceeds the annual income limit; or

(5) A Section 306 Pension beneficiary has a net worth of such value that it is reasonable that some part of it be consumed for the beneficiary's maintenance. Rating of net worth will be made under § 5.476.

(b) Finality of discontinuance. Discontinuance of Old-Law Pension or Section 306 Pension for one of the reasons listed in paragraph (a) of this section means that a pension beneficiary is no longer entitled to receive Old-Law Pension or Section 306 Pension benefits. Any new entitlement that may be established would be to Improved Pension.

(c) Reduction and finality of reduction. If a beneficiary of Old-Law Pension or Section 306 Pension loses a dependent for whom the beneficiary was receiving additional pension before January 1, 1979, VA must reduce the beneficiary's pension by the additional amount payable based on that dependent. Such reductions are final and rates do not increase. VA must discontinue pension as provided in paragraph (a)(4) of this section if a veteran or surviving spouse no longer has any dependents and his or her annual income exceeds the annual income limit for a veteran or surviving spouse alone.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.471 Annual income limits and rates for Old-Law Pension and Section 306 Pension.

(a) Where to find the annual income limits and pension rates. When annual income limits are adjusted as provided in paragraph (b) of this section, VA will publish the new limits in the "Notices" section of the Federal Register. Current and historical annual income limits and historical pension rates for Old-Law Pension and Section 306 Pension can be found on the internet at http://www.va.gov, and are available from any Veterans Service Center or Pension Management Center.

(b) When annual income limits are adjusted. Whenever there is a cost-of-living increase in Social Security benefit amounts under the Federal Old-Age, Survivors, and Disability Insurance Benefits section of the Social Security Act (42 U.S.C. 415(i)), VA will increase the following incomes by the same percentage effective the same date:

(1) The annual income limits applicable to continued receipt of Old-Law Pension and Section 306 Pension; and

(2) The dollar amount of the spousal income not counted under § 5.473(b)(2)(ii)(A) in determining the income of a veteran for Section 306 Pension purposes.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.472 Rating of income for Old-Law Pension and Section 306 Pension.

(a) Scope. This section provides rules for determining how to count income for Old-Law Pension and Section 306 Pension purposes. This section also applies to counting spousal income as part of the veteran's income for Section 306 Pension purposes.

(b) Countable income—(1) All payments counted as income. VA counts all payments of any kind from any source in determining the income of a pension beneficiary, except certain payments that are not counted as income as provided in this section or under § 5.473.

(2) Payments. For purposes of this section, "payments" are cash and cash equivalents (such as checks and other negotiable instruments), and the fair market value of personal services, goods, or room and board received in lieu of other forms of payment.

(i) Section 306 Pension. For Section 306 Pension purposes, VA counts as income retirement benefits (pension or retirement payments).

(ii) Old-Law Pension. For Old-Law Pension purposes, retirement benefits from the following sources are not counted as income if the benefits have been waived pursuant to Federal statute:

(A) Civil Service Retirement and Disability Fund;

(B) Railroad Retirement Board;

(C) District of Columbia for firemen, policemen, or public school teachers; and

(D) Former U.S. Lighthouse Service.

(3) Countable income is rounded down. VA rounds countable income down to the nearest whole dollar. For Section 306 Pension, VA rounds down after subtracting any authorized deductible expenses specified in § 5.474.

(4) Income considered for year of receipt. VA calculates income for the calendar year in which it is received and considers income for the calendar year. However, when VA discontinues Old-Law Pension or Section 306 Pension benefits based on income that exceeds the limit, it does so effective January 1 of the following calendar year as provided in § 5.477.

(c) Deductions from specific income sources—(1) Expenses of a business or profession. Necessary business operating expenses such as the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements are deductible from income from a business or profession. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income that is derived from any other source. For purposes of this section, "business" includes the operation of a farm and transactions involving investment property.

(2) Expenses associated with disability, accident, or health insurance recoveries. VA will deduct from sums recovered under disability, accident, or health insurance medical, legal, or other expenses incident to the insured injury or illness. However, VA will not then deduct the same medical expenses as unusual medical expenses under § 5.474.

(3) Salary deductions and employer contributions. Income from a salary is not determined by "take-home" pay. Generally, the salary counted as income is the gross salary before any deductions. However, an employer's contributions to health and hospitalization plans will not be counted as part of gross salary.

(d) Income-producing property and income from property sales—(1) Scope. This paragraph (d) provides rules for determining whether income from income-producing property and property sales will be counted as a pension beneficiary's income. The provisions of this paragraph (d) apply to all property, real or personal, in which a pension beneficiary has an interest, whether acquired through purchase, bequest, or inheritance.

(2) Proof of ownership. In determining whether to count income from real or personal property or property sales, VA will consider the terms of the recorded deed or other evidence of title. In the absence of evidence showing otherwise, VA will accept the beneficiary's statement as proof of the terms of ownership.

(3) Transfer of ownership with retention of income. If a pension beneficiary transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) Income from jointly-owned property. If a pension beneficiary owns property jointly with others, including, but not limited to, partnership property, each person will be considered as receiving an equal share of the income from that property in the absence of evidence showing otherwise.

(5) Property sales for Old-Law Pension. (i) General rule. Net profit from the sale of real or personal property counts as income unless the profit is from the sale of the beneficiary's principal residence.

(ii) Property owned before date of entitlement. In determining net profit from the sale of property owned before the date of entitlement, VA will compare the value of the property at the time entitlement began with the selling price.

(iii) Payments received in installments. If payments are received in installments, the entire amount of installment payments received (including, but not limited to, principal and interest) will not be counted as income until the total of installments received is equal to the cost of the residence, or if paragraph (d)(5)(ii) of this section applies, equal to the value of the property on the date pension entitlement was established. The entire amount of any installment received thereafter will be counted as income.

(6) Profit from sale of principal residence for Old-Law Pension.—(i) General rule. Net profit realized from the sale of an Old-Law Pension beneficiary's principal residence is not counted to the extent that it is applied to the purchase price of a subsequent principal residence for the beneficiary in either the calendar year of the sale or the following year.

(ii) Exception. This rule does not apply where the net profit is applied to the price of a residence purchased before the calendar year preceding the calendar year of the sale of the old residence.

(iii) Reporting requirement. To qualify for this rule, the application of the net profit from the sale of the old residence to the purchase of the replacement residence must be reported to VA no later than 1 year after the date it was so applied.

(7) Profit from sale of non-business property for Section 306 Pension. Profit realized from the disposition of real or personal property other than in the course of a business does not count as income for Section 306 Pension. However, amounts received in excess of the sales price, such as interest payments, do count. If payments are received in installments, the installments received will not begin to count as income until the total of installments received is equal to the sales price The following exceptions apply:

(i) Bonds. If the redemption of a bond issued by a federal, state, municipal or other political entity is required for the payment of accrued interest, then the accrued interest payable is excluded from income.

(ii) Life insurance. If the surrender of a life insurance policy is required to obtain the proceeds, then the interest received is excluded from income.

(e) VA benefits—(1) Old-Law Pension. No VA benefits are not counted as income for Old-Law Pension.

(2) Section 306 Pension. Only the following VA benefits count as income for Section 306 Pension:

(i) Subsistence allowance under 38 U.S.C. 3100 through 3121;

(ii) Special allowance under 38 U.S.C. 1312(a);

(iii) Accrued benefits, unless paid as a reimbursement; and

(iv) World War I adjusted disability compensation.

(f) Income not counted for Old-Law Pension or Section 306 Pension. VA will not count payments from the sources listed in this paragraph (f) when calculating income for Old-Law Pension or Section 306 Pension. Paragraph (g) of this section lists additional sources of income that are not counted for Section 306 Pension.

(1) Maintenance. The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, in addition to money paid to an institution for the care of the beneficiary due to impaired health or advanced age. However, if the maintenance is paid to the beneficiary and not counted as income under this provision, VA cannot also deduct it as an unusual medical expense under § 5.474.

(2) Survivor benefit annuity. Annuities paid by the Department of Defense under the authority of Public Law 100-456, Sec. 653, 102 Stat. 1991, to qualified surviving spouses of veterans who died before November 1, 1953.

(3) Death gratuity. Death gratuity payments under 10 U.S.C. 1475 through 1480.

(4) State service bonuses. Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(5) Payment for civic obligations. Payments received for performance of jury duty or other obligatory civic duties.

(6) Fire loss reimbursement. Proceeds from fire insurance.

(7) Certain life insurance payments. Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, Veterans' Group Life Insurance, or National Service Life Insurance.

(8) Rental value of beneficiary's property. The rental value of a beneficiary's use of his or her real property, such as the rental value of the beneficiary's personal residence.

(9) Increased inventory value of a business. The value of an increase of stock inventory of a business.

(10) Commercial insurance dividends. Dividends from commercial insurance.

(11) Employer contributions for a retired employee. Contributions a public or private employer makes to either of the following programs:

(i) Public or private health or hospitalization plan for a retired employee; or

(ii) Retired employee as reimbursement for premiums for supplementary medical insurance benefits under the Social Security program.

(12) Income from retirement plans and similar plans and programs. 10 percent of the amount of payments under public or private retirement, annuity, endowment, or similar plans is not counted as income. This rule includes, but is not limited to, payments received from any of the following sources:

(i) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(ii) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(iii) Retirement benefits received from the Railroad Retirement Board. However, if the beneficiary is a veteran receiving Old-Law Pension, payments from this source do not count at all.

(iv) Payments for permanent and total disability or death received from the Office of Workers' Compensation Programs of the U.S. Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including, but not limited to, damages collected incident to a tort suit under an employer's liability law of the U.S. or a political subdivision of the U.S. This 10 percent income reduction is applied after any adjustments are made under paragraph (c)(2) of this section.

(v) The proceeds of commercial annuity, endowment, or life insurance.

(vi) The proceeds of disability, accident, or health insurance. This 10 percent income reduction applies after the income from the specified payments is reduced by the deductions described in paragraph (c)(2) of this section.

(13) Other payments. Other payments listed in § 5.706.

(g) Income not counted for Section 306 Pension. In addition to the payments listed in paragraph (f) of this section, VA will not count payments from the following sources as income for Section 306 Pension:

(1) Donations received. Donations from public or private relief or welfare organizations, in addition to benefits received under noncontributory programs such as Supplemental Security Income payments.

(2) Social Security death payments. Lump sum death payments under title II of the Social Security Act.

(3) Money acquired from joint accounts because of death. Money that a death pension beneficiary acquires because of the death of a co-owner of a joint account in a bank or similar financial institution.

(h) Donations are income for Old-Law Pension. If an Old-Law Pension beneficiary receives additional donations from public or private relief organizations for members of his or her family, these additional allowances may not be divided per member of the family in determining the pension beneficiary's income. The entire payment is counted as income.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

CROSS REFERENCE: § 5.1, for the definitions of "political subdivision of the U.S." and "State".

§ 5.473 Counting a dependent's income for Old-Law Pension and Section 306 Pension.

(a) Old-Law Pension for veterans. VA will not count the separate income of a veteran's spouse or child in computing income for a veteran Old-Law Pension beneficiary.

(b) Section 306 Pension for a veteran—(1) Child's income. VA will not count the separate income of a veteran's child in computing income for a veteran Section 306 Pension beneficiary.

(2) Spousal income—(i) VA presumptions concerning spousal income. For Section 306 Pension purposes, if a veteran and his or her spouse live together, VA presumes:

(A) That the spouse's income is available to the veteran. The veteran may rebut this presumption by filing evidence showing that all or part of the spouse's income is not available.

(B) That counting the spouse's income would not cause the veteran hardship. The veteran may rebut this presumption by filing evidence showing that there are expenses beyond the usual family requirements. Examples of such expenses include special training for a handicapped child and expenses for the prolonged illness of a family member. However, if the spouse's income is not counted because it is needed to pay for unusual medical expenses, the same medical expenses cannot be deducted as unusual medical expenses under § 5.474(b.

(ii) Spousal income that is not counted. Unless the spouse's income is not counted under paragraph (b)(2)(i)(A) of this section, the spouse's income will be counted as part of the veteran's income for Section 306 Pension purposes. However, VA will not count as income to the veteran the greater of the following two amounts:

(A) The amount of spousal income not counted under Public Law 95-588, section 306(a)(2)(B) (as increased by amounts published in the "Notices" section of the Federal Register); or

(B) All of the spouse's earned income.

(c) Old-Law Pension or Section 306 Pension for a veteran—(1) Veteran's child not in surviving spouse's custody. For Old-Law Pension or Section 306 Pension purposes, if a deceased veteran is survived by a spouse and a child, the annual income limits for a surviving spouse and child apply even if the child is not the surviving spouse's child and not in the surviving spouse's custody.

(2) When a child's separate income is not counted. (i) VA will not count a child's separate income as part of the surviving spouse's income if it is paid to the child, regardless of who has custody of the child.

(ii) If the child's income is paid or given to the surviving spouse, VA will only count as much of the child's income as remains after deducting the child's living expenses.

(d) Child benefits—(1) Old-Law Pension. Earned income of a child beneficiary counts as income for Old-Law Pension.

(2) Section 306 Pension. Earned income of a child beneficiary is not counted as income for Section 306 Pension.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.474 Deductible expenses for Section 306 Pension only.

(a) Scope. This section applies to Section 306 Pension only. Because Section 306 Pension rates cannot increase, deductible expenses paid after December 31, 1978, can only be deducted from a pension beneficiary's income so that the beneficiary's income remains within the annual income limit and the beneficiary maintains entitlement to Section 306 Pension.

(b) Unusual medical expenses—(1) Definitions—(i) Family member. For Section 306 Pension purposes, a "family member" is a relative of the beneficiary who is a member of the beneficiary's household whom the beneficiary has a moral or legal obligation to support. This includes a relative who is physically absent from the household for a temporary purpose or for reasons beyond his or her control.

(ii) Unusual medical expenses. For purposes of this section, unusual medical expenses means unreimbursed medical expenses above 5 percent of annual income. For the definition of medical expenses that VA will deduct, see § 5.707.

(2) Veteran or surviving spouse benefits. VA will deduct amounts paid by a veteran or surviving spouse for the veteran's or surviving spouse's unusual medical expenses and those of family members.

(3) Child benefits. VA will deduct amounts paid by a child pension beneficiary for his or her unusual medical expenses and those of the child's parents, brothers, and sisters.

(4) When expenses are deducted. VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) Proof of expenses. VA will accept the pension beneficiary's statement as proof of the amount and nature of such medical expenses, the date of payment, and the identity of the creditor, unless the circumstances create doubt as to the statement's credibility.

(6) Estimates of expenses for future benefit periods. VA will project anticipated medical expenses based on a clear and reasonable expectation that they will continue. See § 5.709 (concerning the beneficiary's responsibility to inform VA concerning income changes).

(c) Final expenses—(1) Definition. "Final expenses" are amounts paid for the expenses of a deceased person's last illness and burial. The same expense cannot be deducted as both a final expense and an unusual medical expense under paragraph (b) of this section.

(2) Final expenses paid by the veteran. VA will deduct from a veteran's income the final expenses the veteran pays for his or her spouse or child.

(3) Final expenses paid by a surviving spouse. VA will deduct from a surviving spouse's income the final expenses the surviving spouse pays for the veteran's child.

(4) Proof of expenses. VA will accept as proof of expenses deductible under paragraph (c) of this section the pension beneficiary's statement as to the amount and

nature of each expense, the date of payment, and identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(5) When expenses are deducted. Expenses deductible under paragraph (c) of this section are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the spouse, surviving spouse, or child died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the beneficiary's advantage.

(d) Prepayment on real property mortgage after death of spouse—(1) Section 306 Pension: veteran beneficiaries only. If a veteran who is receiving Section 306 Pension makes a pre-payment on a mortgage or similar type security instrument on real property after the death of his or her spouse, VA will deduct the amount of the pre-payment from the veteran's income. The real property must have been the principal residence of the veteran and spouse, and the mortgage or security instrument must have existed when the veteran's spouse died.

(2) Time limit of pre-payment. The pre-payment described in paragraph (d)(1) of this section must be made after the spouse's death but before the end of the year following the year of death. VA will deduct the amount of the pre-payment from the veteran's income for the year of death or the year after death, whichever is to the veteran's advantage.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.475 Gaining or losing a dependent for Old-Law Pension and Section 306 Pension.

(a) Pension beneficiary gains a dependent—(1) Old-Law Pension or Section 306 Pension. If an Old-Law Pension or Section 306 Pension beneficiary gains a dependent, VA will determine if a higher annual income limit applies. A higher limit applies if the beneficiary previously did not have a dependent.

(2) Veteran receiving Section 306 Pension gains a spouse who has income. If a veteran beneficiary of Section 306 Pension gains a spouse who has countable income, VA will recalculate the veteran's income for the year in which the person became the veteran's spouse. VA will then determine if the veteran is entitled to continued pension benefits or whether the recalculated income exceeds the annual income limit. VA makes the determination based on calendar year income. However, VA will not count income that the spouse received or deduct any of the spouse's expenses paid before the date the person became the veteran's spouse for VA purposes.

(b) Pension beneficiary loses dependent—(1) Loss of last dependent. When an Old-Law Pension or Section 306 Pension beneficiary loses his or her last dependent, his or her annual income limit is lowered. When this occurs, VA must determine if the beneficiary is still entitled to such pension based on the lowered income limit and recalculated income for the calendar year that the dependent was lost.

(2) Computation of new rate if a dependent established before January 1, 1979. If a beneficiary of Old-Law Pension or Section 306 Pension loses a dependent based upon whom the beneficiary was receiving additional pension before January 1, 1979, VA must reduce the beneficiary's pension by the additional amount payable based on

that dependent. Because Old-Law Pension and Section 306 Pension rates are based on income from the year 1978 and number of dependents, VA calculates the new rate by removing the dependent and the dependent's 1978 income, if any, and using the remaining 1978 income to determine the new rate.

(i) If the recalculated rate is higher than the previous rate, VA will continue the previous rate.

(ii) If the rate payable to a surviving spouse with one child is less than the rate payable for a child alone, the surviving spouse will be paid the child's rate unless paragraph (b)(2)(i) of this section applies.

(c) Section 306 Pension and dependency of spouse. For Section 306 Pension purposes, the December 31, 1978, rates for a veteran with a spouse and the annual income limit for a veteran with a spouse apply as long as the veteran and spouse live together or if not living together, are not estranged. If they are estranged, the married rates and the annual income limit for a veteran with a spouse apply if the veteran is reasonably contributing to the spouse's support. VA counts spousal income only if the annual income limit for a veteran with a spouse applies. VA bases its determination of "reasonable" contribution on all of the circumstances of the case, including, but not limited to, a consideration of the veteran's income and net worth and the spouse's separate income and net worth. VA automatically considers the requirement of "reasonable" contribution met without further review if the spouse is receiving an apportionment under § 5.780.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.476 Net worth for Section 306 Pension only.

(a) Definition. For purposes of determining continuing entitlement to Section 306 Pension, net worth means the market value, minus mortgages or other encumbrances, of all real and personal property the beneficiary owns. VA excludes the beneficiary's residence (single-family unit), which also includes a reasonably sized lot, and personal effects suitable to and consistent with the beneficiary's reasonable mode of life. VA will evaluate a "reasonably sized lot" by considering the typical size of lots in the area. If the person lives on a farm, VA will not count the value of a reasonably sized lot, including the residence area, and consider the rest of the farm as part of net worth.

(b) General rule. VA only considers the net worth of the veteran, surviving spouse, or child beneficiary. In determining whether property belongs to a pension beneficiary, VA will consider the terms of the recorded deed or other evidence of title. In the absence of contradictory evidence, VA will accept the beneficiary's statement as proof of the terms of ownership. In the absence of contradictory evidence, VA will accept the beneficiary's estimate of the value of property.

(c) How VA evaluates net worth. In determining whether some part of a beneficiary's net worth should be used for his or her maintenance, VA considers the beneficiary's income as determined under § 5.472, along with all of the beneficiary's living expenses. In considering the beneficiary's living expenses, VA cannot consider

expenses that were deducted in determining income. However, VA will also consider the following factors in evaluating net worth:

(1) The value of liquid assets;

(2) The ability of the beneficiary to dispose of property if limited by community property laws;

(3) The number of family members (as described in § 5.474(b)(1)(i) who depend on the beneficiary for support; and

(4) The beneficiary's average life expectancy, and the potential rate of depletion of the beneficiary's net worth.

(d) Amounts not countable as net worth as a matter of law. Resources not countable by statute will not be considered part of the beneficiary's net worth. For the list of such resources, see § 5.706.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.477 Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

(a) Reductions and discontinuances based on certain events. If required, VA will pay a reduced Old-Law Pension or Section 306 Pension rate or discontinue benefits effective January 1 of the calendar year immediately following any of these events:

(1) Marriage, annulment, divorce, or death. A beneficiary loses a dependent due to marriage, annulment, divorce, or death.

(2) Increased income. The beneficiary receives increased income that could not reasonably have been anticipated based on the amount actually received from that source the previous year.

(3) Increased net worth. The beneficiary's net worth increases to the extent benefits must be discontinued (Section 306 Pension only).

(b) General effective dates apply for other reasons. VA will use the appropriate effective dates as specified in § 5.705 for a discontinuance or reduction for any reason other than those stated in paragraph (a) of this section or in § 5.478(a).

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2508)

§ 5.478 Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension.

(a) Expected income appears to exceed income limit. If it appears that an Old-Law Pension or Section 306 Pension beneficiary's income for a calendar year will be higher than the annual income limit for that calendar year, VA will discontinue pension benefits for that calendar year effective January 1 of the following year, subject to paragraph (b) of this section.

(b) Time limit for continuing entitlement. If VA discontinues pension benefits as described in paragraph (a) of this section because of the beneficiary's expected income for a calendar year, the beneficiary can establish continuing entitlement by filing

evidence showing that income for the calendar year was below the annual income limit. The beneficiary must file the evidence before the end of the calendar year that follows the year for which VA determined the income exceeded the limit. For example, if VA determines that a beneficiary's income for the year 2005 exceeds the income limit and discontinues pension benefits effective January 1, 2006, the beneficiary has to submit evidence, such as deductible medical expenses or other information, before January 1, 2007, showing that 2005 income was within the 2005 income limit.

(c) Finality of discontinuance. If a beneficiary does not file income evidence as described in paragraph (b) of this section or if such evidence does not warrant continued benefits, the discontinuance described in paragraph (a) of this section is final. This means that the beneficiary is no longer entitled to receive Old-Law Pension or Section 306 Pension benefits. Any new entitlement that may be established would be to Improved Pension.

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

§§ 5.479–5.499 [Reserved]

Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary

§ 5.500 Proof of death.

(a) Purpose and application. (1) This section describes evidence VA will accept to prove that a person has died in cases where the death of the person is relevant to eligibility for a benefit. It covers the most common situations. Sections 5.501 and 5.502 apply where the evidence described in this section is not available.

(2) Where more than one paragraph of this section applies, VA will accept the evidence described in any relevant paragraph as proof of death. For example, if the person died in a U.S. Government hospital located within a State, VA would accept the evidence establishing death specified in either paragraph (b) or (d) of this section.

(b) Deaths occurring within a State. VA will require as proof of death occurring within a State the first type of evidence listed in this paragraph (b), if obtainable. If this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(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 of a verdict of a coroner's jury, from the State or community where death occurred, provided the report or verdict properly identifies the deceased.

(c) Deaths occurring outside the U.S. VA will require as proof of death occurring outside the U.S. the first type of evidence listed in this paragraph (c), if obtainable. If

this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(1) A U.S. consular report of death bearing the signature and seal of the U.S. consul.

(2) A copy of the public record of death authenticated by the U.S. consul or other agency of the State Department or which is exempt from such authentication as provided in § 5.132(c)(5) (concerning certain copies of public or church records).

(3) An official report of death of a civilian employee of the U.S. Government from the employing U.S. Government entity.

(d) Deaths at institutions under the control of the U.S. Government. VA will only accept as proof of death occurring in a hospital or other institution under the control of the U.S. Government the first type of evidence listed in this paragraph (d). If this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(1) A death certificate signed by a medical officer.

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

(e) Deaths of members of the uniformed services. The death of a member of the uniformed services may be established by an official report of the death from the uniformed service concerned.

(Authority: 38 U.S.C. 501(a)(1))

§ 5.501 Proving death by other means.

(a) Applicability. This section and § 5.502 describe methods of proving that a person has died if the death of that person is relevant to eligibility for a benefit and the evidence described in § 5.500.

(b) Required statement. A claimant seeking to establish the fact of death under this section must file a statement explaining why none of the evidence described in § 5.500 is available.

(c) Affidavits or certified statements of witnesses who viewed the body. The fact of death may be established by the affidavit or certified statement of one or more persons who have personal knowledge of the fact of death, have viewed the body of the deceased, and know it to be the body of the person whose death is being alleged. These affidavits or statements should describe all the facts and circumstances known concerning the death, including the place, date, time, and cause of death.

(d) Other methods of establishing death. If the claimant cannot furnish the affidavits or certified statements described in paragraph (c) of this section, the fact of death may be established by one of the following:

(1) U.S. Government agency finding. In the absence of evidence to the contrary, VA will accept a finding of the fact of death by another U.S. Government agency.

(2) Body not recovered or not identifiable. If circumstances preclude recovery or identification of the body of the deceased, the fact of death may be established by the claimant's affidavit or certified statement setting forth the circumstances under which the missing person was last seen, the known facts which led the claimant to believe that death has occurred, and one of the following, as applicable:

(i) The affidavits or certified statements of persons who witnessed the event in which the missing person is alleged to have perished, describing the event and, if applicable, why they believe the missing person perished in the event, or

(ii) If the testimony of eyewitnesses is not obtainable, the affidavits or certified statements of persons who have the most reliable information available concerning why the missing person is believed to have been at the event in which the missing person is alleged to have perished, why the missing person was in imminent peril at the time the event occurred, and the basis on which they concluded that death was caused by the event.

(3) Finding of fact of death by authorized VA official. An authorized VA official may make a finding of the fact of death where death is shown by competent evidence. See § 5.5 (concerning delegation of authority to make findings and decisions concerning entitlement to benefits).

(Authority: 38 U.S.C. 501(a)(1))

§ 5.502 Proving death after 7 years of continuous, unexplained absence.

(a) Evidence required. A claimant seeking to establish the death of a person who has been absent for 7 years, where death is not established with documentary evidence described in § 5.500 or § 5.501, must produce competent, credible evidence to show that:

(1) The person has been continuously absent from home and family for at least 7 years without explanation; and

(2) A diligent search disclosed no evidence of the person's continued existence after the absence.

(b) Finding of death conclusive. A finding of death under this section will be conclusive and final for purposes of laws administered by VA except where suit is filed for insurance under 38 U.S.C. 1984, Suits on insurance.

(c) Impact of findings of death made by other entities. (1) State laws that provide for presumption of death are not applicable to claims for benefits and may not be used to establish death under this section.

(2) A finding of death by another Federal agency meeting the criteria described in paragraphs (a)(1) and (2) of this section is acceptable for VA purposes if there is no credible evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a)(1))

§ 5.503 Establishing the date of death.

(a) Applicability. This section applies when the fact of death is established under §§ 5.500 through 5.502, but the exact date of death is uncertain.

(b) Date of death in cases involving a continuous, unexplained absence of seven years or more. When the fact of death is established under § 5.502, the date of death for purposes of the laws administered by VA is 7 years after the date the person was last known to be alive.

(c) Date of death in other cases. If the fact of death is established by the evidence described in § 5.500 or § 5.501, VA will determine the date of death for purposes of the laws administered by VA by considering all of the known facts and circumstances surrounding the death, including, but not limited to, the condition of the body when found and any estimate of the date of death provided by a coroner or other official within the scope of that official's duties. If no identifiable body is found, the date of death will be presumed to be the date the deceased was last known to be alive in the absence of evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a))

§ 5.504 Service-connected cause of death.

(a) Purpose. Eligibility for several benefits for a veteran's survivors requires that the veteran's death be service connected. This section provides the rules VA uses to determine whether a veteran's death is service connected.

(b) Definition of service-connected disability.—(1) General. For purposes of this section, service-connected disability means:

(i) Except as provided in paragraph (b)(2) of this section, a disability that was service connected at the time of the veteran's death, or

(ii) A disability that is service connectable under the provisions of subpart E of this part, Claims for service connection and disability compensation. For purposes of this section, VA will presume that a death that occurred in line of duty was preceded by disability.

(2) Exception. For purposes of this section, "service-connected disability" does not include a disability that was service connected at the time of the veteran's death if the law in effect at the time of a survivor's claim precludes VA from establishing service connection for the cause of the veteran's death. See §§ 5.365 and 5.662(a) and (c)(2).

(c) Determining whether a veteran's death is service connected. A veteran's death is service connected if death resulted from a service-connected disability. Death resulted from a service-connected disability if the service-connected disability produced death or hastened death, as provided in the following paragraphs:

(1) Service-connected disability produces death. A service-connected disability is the cause of death if a single service-connected disability, or the combined effect of multiple service-connected disabilities, is such that death would not have occurred in the absence of the disability, or disabilities. If two or more disabilities were present at the time of death, only one of which was service connected or service connectable, and

each disability by itself was sufficient to bring about death, VA will grant service connection for the cause of the veteran's death.

(2) Contributory cause of death. (i) 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 produce 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.

(ii) 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.

(iii) 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.

(iv) 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.

(Authority: 38 U.S.C. 101(16), 501(a), 1121, 1141, 1310)

§§ 5.505 – 5.509 [Reserved]

DEPENDENCY AND INDEMNITY COMPENSATION – GENERAL

§ 5.510 Dependency and indemnity compensation – basic entitlement.

(a) Definition. Dependency and indemnity compensation (DIC) is a monthly VA payment to a veteran's survivor (surviving spouse, child, or parent) based on the veteran's death.

(b) Bases for entitlement. There are three ways in which a survivor may become entitled to DIC:

(1) Service-connected death – 38 U.S.C. 1310. (i) VA will grant DIC to the survivor of a veteran when it determines that the cause of the veteran's death, whether occurring during or after service, is service connected. See 38 U.S.C. 1310, Deaths entitling survivors to dependency and indemnity compensation, and § 5.504.

(ii) DIC is not payable unless the service-connected death occurred after December 31, 1956, except in the case of certain persons receiving or eligible to receive death compensation who elect to receive DIC in lieu of death compensation. See §§ 5.742 and 5.759.

(2) Veterans with a service-connected disability rated as totally disabling at the time of death – 38 U.S.C. 1318. VA will grant DIC to the survivor of a veteran rated totally disabled due to service-connected disability for a specified period of time at the time of death, in the same manner as if the veteran's death was service connected. See 38 U.S.C. 1318, Benefits for survivors of certain veterans rated totally disabled at time of death, and §§ 5.521 and 5.522.

(3) Veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services – 38 U.S.C. 1151. VA will grant DIC to the survivor of a veteran whose death was caused by VA-furnished hospital care, medical or surgical treatment, medical examination, training and rehabilitation services, or participation in a compensated work therapy program, in the same manner as if the veteran's death were service connected. See § 5.350.

(c) Certain Federal Employees' Group Life Insurance beneficiaries ineligible. VA cannot pay DIC 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 occurring after April 30, 1957, if any amounts are payable based on the same death under the Federal Employees' Group Life Insurance Act of 1954 (Pub. L. 83-598, 86 Stat. 736, as amended).

(d) Special rules for parents' DIC. The basis of entitlement described in paragraph (b)(2) of this section does not apply to parent's DIC, and payment of parent's DIC is subject to income limitations. See §§ 5.530 through 5.537 for special eligibility and payment rules for parent's DIC.

(Authority: 38 U.S.C. 101(14), 1151, 1304, 1310, 1315, 1318; Sec. 501(c)(2), Pub. L. 84-881, 70 Stat. 880, as amended by Sec. 13(u), Pub. L. 85-857, 72 Stat. 1266; Sec. 5, Pub. L. 91-621, 84 Stat. 1864)

§ 5.511 Special monthly dependency and indemnity compensation.

(a) Entitlement based on need for regular aid and attendance. A surviving spouse or parent in receipt of dependency and indemnity compensation (DIC) is entitled to special monthly DIC benefits if he or she needs regular aid and attendance. VA will make determinations of the need for aid and attendance under the criteria in § 5.320.

(b) Automatic entitlement. VA will automatically consider a person to need regular aid and attendance, without having to demonstrate the disability described in paragraph (a) of this section, if the person:

(1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less in both eyes;

(2) Has concentric contraction of the visual field in both eyes to 5 degrees or less; or

(3) Is a patient in a nursing home because of mental or physical incapacity.

(c) Entitlement based on permanent housebound status – surviving spouse. A surviving spouse who is not entitled to special monthly DIC based on the need for regular aid and attendance, as provided in paragraphs (a) and (b) of this section, is entitled to special monthly DIC if he or she is permanently housebound. A surviving spouse will be considered permanently housebound if substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the surviving spouse's lifetime.

(Authority: 38 U.S.C. 1311(c), (d), 1315(g))

§ 5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

(a) General rule. Subject to paragraph (b) of this section, VA will not pay death compensation or death pension to any person eligible for dependency and indemnity compensation (DIC) based upon a death occurring after December 31, 1956.

(b) Right of spouse to elect death pension. A surviving spouse eligible for DIC may elect to receive death pension instead of DIC. For effective date information, see § 5.743(a).

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

§§ 5.513 – 5.519 [Reserved]

DEPENDENCY AND INDEMNITY COMPENSATION – ELIGIBILITY REQUIREMENTS AND PAYMENT RULES FOR SURVIVING SPOUSES AND CHILDREN

§ 5.520 Dependency and indemnity compensation – time of marriage requirements for surviving spouses.

(a) Purpose. In addition to meeting the marriage requirements necessary to qualify as a surviving spouse, as defined at § 5.200(a), a surviving spouse must meet certain requirements concerning the time of his or her marriage to the veteran in order to be eligible for dependency and indemnity compensation (DIC). This section sets out those requirements.

(b) Time of marriage requirements.—(1) Surviving spouse eligible under § 5.510(b)(1) or (3). A surviving spouse meets the time of marriage requirements for DIC under the bases for eligibility set out in § 5.510(b)(1) or (3) if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse married the veteran before or during the veteran's military service.

(ii) The surviving spouse was married to the veteran for 1 year or more. Multiple periods of marriage may be added together to meet the 1-year marriage requirement.

(iii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or was born to them before the marriage. See § 5.1 for the definition of, child born of the marriage and child born before the marriage.

(iv) The surviving spouse married the veteran no later than 15 years after the date of termination of the period of service in which the injury or disease causing the veteran's death was incurred or aggravated. For purposes of paragraph (b)(1) of this section, period of service means a period of active military service from which the veteran was discharged under conditions other than dishonorable. If the surviving spouse has been married to the veteran more than once, see § 5.200, Surviving spouse: requirement of valid marriage to veteran.

(2) Surviving spouse eligible under § 5.510(b)(2). A surviving spouse meets the time of marriage requirements for DIC under the basis for eligibility set out in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318, if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse was married to the veteran continuously for 1 year or more immediately preceding the veteran's death.

(ii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or was born to them before the marriage. See § 5.1 for the definition of child born of the marriage and child born before the marriage.

(Authority: 38 U.S.C. 1151, 1304, 1310, 1318)

§ 5.521 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death.

(a) Even though a veteran died of non-service-connected causes, VA will pay death benefits to the surviving spouse or child in the same manner as if the veteran's death was service connected, if:

(1) The veteran's death was not the result of his or her willful misconduct; and

(2) At the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was:

(i) Rated by VA as totally disabling for a continuous period of at least 10 years immediately preceding death;

(ii) Rated by VA as totally disabling continuously since the veteran's release from active duty and for at least 5 years immediately preceding death; or

(iii) Rated by VA as totally disabling for a continuous period of not less than 1 year immediately preceding death, if the veteran was a former prisoner of war.

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

(b) For purposes of this section, entitled to receive means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(1) The veteran would have received total disability compensation at the time of death for a service-connected disability rated totally disabling for the period specified in paragraph (a)(2) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(2) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§ 5.166 and 5.55(b), for the relevant period specified in paragraph (a)(2) of this section; or

(3) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (a)(2) of this section, but was not receiving compensation because:

(i) VA was paying the compensation to the veteran's dependents;

(ii) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(iii) The veteran had not waived retired or retirement pay in order to receive compensation;

(iv) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(v) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(vi) VA was withholding payments under 38 U.S.C. 5308 but determined that benefits were payable under 38 U.S.C. 5309.

(c) For purposes of this section, “rated by VA as totally disabling” includes total disability ratings based on unemployability (§ 4.16 of this chapter).

§ 5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death – offset of wrongful death damages.

(a) Applicability. This section applies when a surviving spouse or child:

(1) Is eligible for dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318; and

(2) 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 wrongful death of the veteran whose death is the basis for such benefits.

(b) Offset. VA will not pay DIC on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the

time of death under 38 U.S.C. 1318, for any month after a month in which the beneficiary receives money or property described in paragraph (a)(2) of this section until the total amount of the DIC benefits that would otherwise have been payable equals the total amount of such money and/or value of such property. This paragraph (b) does not apply to DIC benefits payable under this section for any period before the end of the month in which such money or property was received.

(c) Amount of offset. The following rules apply when calculating the amount to be offset in DIC cases:

(1) VA will count in the amount to be offset damages typically recoverable under wrongful death statutes, such as reimbursement for the loss of support, services, and other contributions, which the surviving spouse or child would have received if the veteran had lived and, where allowed, reimbursement for pain, suffering or mental anguish of the survivors due to death. Damages recoverable as compensation for injuries suffered by, or economic loss sustained by, the veteran prior to death such as wages lost prior to death, medical expenses, and compensation for the veteran's pain and suffering prior to death are not counted.

(2) VA will count in the amount to be offset amounts paid to a third party to satisfy a legal obligation of the surviving spouse or child. VA will also count the payment of the claimant's proportional share of attorney's fees, court costs, and other expenses incident to the civil claim.

(3) VA will not count in the amount to be offset money or property payable to a person or entity other than the spouse or child under the terms of the judgment,

settlement, or compromise agreement unless the spouse or child receives the benefit of such a payment. For example, wrongful death damages paid to a veteran's estate or into a trust or similar arrangement will be counted in the amount to be offset to the extent that they are distributed to, or available for the use and benefit of, the surviving spouse or child.

(4) VA will not count in the amount to be offset benefits received under Social Security or worker's compensation even though such benefits may have been awarded in a judicial proceeding.

(5) The value of property received is that property's fair market value at the time it is received by the claimant.

(d) Beneficiary's duty to report receipt of money or property. Any person entitled to DIC on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318, must promptly report to VA the receipt of any money or property described in paragraph (a)(2) of this section. This obligation may be satisfied by providing VA a copy of the judgment, settlement agreement, or compromise agreement awarding the money or property. Overpayments created by failure to report will be subject to recovery if not waived.

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

§ 5.523 Dependency and indemnity compensation rate for a surviving spouse.

(a) General determination of rate. When VA grants a surviving spouse entitlement to dependency and indemnity compensation (DIC), VA will determine the rate of the benefit it will award. The rate of the benefit will be the total of the basic monthly rate specified in paragraph (b) or (d) of this section and any applicable increases specified in paragraph (c) or (e) of this section.

(b) Basic monthly rate. Except as provided in paragraph (d) of this section, the basic monthly rate of DIC for a surviving spouse will be the amount set forth in 38 U.S.C. 1311(a)(1).

(c) Section 1311(a)(2) increase. The basic monthly rate under paragraph (b) of this section will be increased by the amount specified in 38 U.S.C. 1311(a)(2) if the veteran, at the time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of at least 8 years immediately preceding death. Determinations of entitlement to this increase will be made in accordance with paragraph (f) of this section.

(d) Alternative basic monthly rate for death occurring prior to January 1, 1993. The basic monthly rate of DIC for a surviving spouse when the death of the veteran occurred before January 1, 1993, will be the amount specified in 38 U.S.C. 1311(a)(3) corresponding to the veteran's pay grade in service, but only if such rate is greater than the total of the basic monthly rate and the section 38 U.S.C. 1311(a)(2) increase (if applicable) the surviving spouse is entitled to receive under paragraphs (b) and (c) of

this section. The Secretary of the concerned service department will certify the veteran's pay grade and the certification will be binding on VA. DIC paid pursuant to this paragraph (d) may not be increased by the section 1311(a)(2) increase under paragraph (c) of this section.

(e) Additional increases. One or more of the following increases may be paid in addition to the basic monthly rate and the 38 U.S.C. 1311(a)(2) increase.

(1) Increase for a child. If the surviving spouse has one or more children of the deceased veteran who are under age18 (including a child not in the surviving spouse's actual or constructive custody or a child who is in active military service), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(b) for each child.

(2) Increase for regular aid and attendance. If the surviving spouse is determined to need regular aid and attendance under the criteria in §§ 5.320, Determining need for regular aid and attendance, and 5.332(c), Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2) or is a patient in a nursing home, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(c).

(3) Increase for housebound status. If the surviving spouse is not entitled to the regular aid and attendance allowance but is housebound under the criteria in § 5.391(b), Special monthly pension for a veteran or surviving spouse at the housebound rate, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(d).

(4) For a 2-year period beginning on the date entitlement to DIC commenced, the DIC paid monthly to a surviving spouse with one or more children under age18 will be increased by the amount set forth in 38 U.S.C. 1311(f), regardless of the number of such children. The DIC payable under this paragraph (e) is in addition to any other DIC payable. The increase in DIC of a surviving spouse under this paragraph (e) will cease beginning with the first of the month after the month in which the youngest child of the surviving spouse has attained age 18.

(Authority: 38 U.S.C. 1311(f))

(f) Criteria governing section 1311(a)(2) increase. In determining whether a surviving spouse is entitled to the section 1311(a)(2) increase under paragraph (c) of this section, the following standards will apply.

(1) Marriage requirement. The surviving spouse must have been married to the veteran for the entire 8-year period referenced in paragraph (c) of this section.

(2) Determination of total disability. As used in paragraph (c) of this section, the phrase “rated by VA as totally disabling” includes total disability ratings based on unemployability (§4.16 of this chapter).

(3) Definition of “entitled to receive”. As used in paragraph (c) of this section, the phrase entitled to receive means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the period specified in paragraph (c) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§ 5.150(a), 5.153, and 5.166, for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

(A) VA was paying the compensation to the veteran's dependents;

(B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(C) The veteran had not waived retired pay in order to receive compensation;

(D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(E) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321)

§ 5.524 Awards of dependency and indemnity compensation benefits to a child when there is a retroactive award to a schoolchild.

(a) Applicability. Dependency and indemnity compensation (DIC) is payable to a child when there is no surviving spouse entitled to DIC. The total amount VA pays to a child depends on the number of children, and the amount that is paid to each child in equal shares. This section states an exception that applies when all of the following conditions are met:

(1) DIC is currently being paid to one or more children;

(2) DIC had previously been paid to an additional child, but payment was discontinued because that child reached age 18;

(3) DIC has been reestablished for that child because he or she is attending an approved educational institution; and

(4) The effective date of the additional child's reestablished entitlement is prior to the date VA received that child's application to reestablish entitlement.

(b) Award to the additional child.—(1) Retroactive payment. When VA approves reinstatement of DIC to an additional child, that child is entitled to retroactive payment for the time period between when the child's entitlement arose and the time VA resumed payment of the DIC award. Retroactive payment is calculated by determining the difference between the total amount payable for all children, including the additional child during the retroactive period and the total amount VA actually paid to the other

children during that period. If more than one child reestablishes entitlement as described in paragraph (a) of this section, the retroactive award will be paid to each such child in equal shares.

(2) Payment commencement date for full equal share. The additional child will be entitled to a full equal share of DIC the first day of the month after the month in which VA approved the additional child's reestablished DIC award.

(c) Effective date of payment of reduced shares to any other child. The running award to any other child will be reduced to the amount of their new equal shares effective the first day of the month after the month in which VA approved the additional child's reestablished DIC award.

(Authority: 38 U.S.C. 1313(b), 5110(e), 5111)

CROSS-REFERENCE: Sections 5.693 Beginning date for certain VA payments, and 5.696 Payments to or for a child pursuing a course of instruction at an approved educational institution.

§ 5.525 Awards of dependency and indemnity compensation when not all dependents apply.

Except as provided in § 5.536(e), in any case where a dependency and indemnity compensation (DIC) claim has been filed by or on behalf of at least one dependent but VA believes that other dependents may be entitled to DIC based on the

death of the same veteran, the award (original or amended) to all dependents who have filed claims will be made for all periods at the rates and in the same manner as if there were no dependents other than the dependents who filed claims. However, if the file reflects that there are additional potential DIC claimants and less than 1 year has passed since the veteran's death, the award to a dependent who has filed a claim will be made at the rate which would be payable as if all dependents were receiving benefits. If, at the expiration of the 1-year period, claims have not been filed for such dependents, VA will pay the full rate to the dependents already receiving DIC. This payment will include any retroactive amounts to which they are entitled.

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

§§ 5.526 – 5.529 [Reserved]

DEPENDENCY AND INDEMNITY COMPENSATION – ELIGIBILITY REQUIREMENTS AND PAYMENT RULES FOR A PARENT

§ 5.530 Eligibility for, and payment of, parent's dependency and indemnity compensation.

(a) Basic eligibility. A veteran's surviving parent may receive dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(1), concerning service-connected death under 38 U.S.C. 1310, and § 5.510(b)(3), concerning veterans whose death was due to certain VA-furnished medical, training, compensated work

therapy, or rehabilitation services under 38 U.S.C. 1151. DIC is not payable to a parent on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318.

(b) Parent's DIC is income based. Unlike DIC benefits for a surviving spouse and child, the amount of a parent's DIC payable is adjusted based on a parent's income and DIC is not payable to a parent whose income exceeds statutory limits. Sections 5.531 through 5.537 provide income and payment rules.

(c) Net worth not considered. Net worth is not a factor in determining entitlement to a parent's DIC or the amount of a parent's DIC payable.

(Authority: 38 U.S.C. 501(a), 1151, 1310, 1315, 1318)

§ 5.531 General income rules for parent's dependency and indemnity compensation.

(a) All payments are counted in income. All payments of any kind from any source are counted in determining the income of a veteran’s parent, except as provided in § 5.533.

(b) Payments. (1) What is counted. For purposes of this section, “payments” are cash and cash equivalents (such as checks and other negotiable instruments) and the fair market value of personal services, goods, or room and board a parent receives in lieu of other forms of payment.

(2) What is not counted. ”Payments” do not include any of the following:

(i) The value of a parent’s use of his or her property, such as the rental value of a home a parent owns and lives in.

(ii) Dividends from commercial insurance policies.

(iii) Retirement benefits from the following sources (or to the following persons), if the benefits have been waived pursuant to Federal statute:

(A) Civil Service Retirement and Disability Fund;

(B) Railroad Retirement Board;

(C) District of Columbia, for firemen, policemen, or public school teachers;

(D) Former U.S. Lighthouse Service.

(c) Spousal income combined. Income for purposes of a parent's dependency and indemnity compensation (DIC) benefits is the combined income of a parent and the parent’s spouse, unless the marriage has been terminated or the parent is legally separated from his or her spouse. Income is combined whether the parent’s spouse is the veteran’s other surviving parent or the veteran’s stepparent. See § 5.534(c) concerning how much of the spouse’s income to count for the year of remarriage.

(d) Income-producing property.—(1) Scope. This paragraph (d) provides rules for determining whether income from property will be counted as a parent’s income. The provisions of this paragraph (d) apply to all property, real or personal, in which a parent has an interest, whether acquired through purchase, bequest or inheritance.

(2) Proof of ownership. In determining whether to count income from real or personal property, VA will consider the terms of the recorded deed or other evidence of title. However, VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(3) Transfer of ownership with retention of income. If a parent transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) Income from jointly owned property. In the absence of evidence showing otherwise, VA will consider a parent who owns property jointly with others, including partnership property, to be entitled to a share of the income from that property proportionate to the parent's share of ownership. VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(e) Procedure when income amounts are uncertain – deferred determinations. When a parent is uncertain about the amount of income the parent will receive during a calendar year, VA will calculate dependency and indemnity payments for that calendar year using the highest amount of income the parent estimates, or VA's best estimate of income if the parent's estimate appears to be unrealistically low in light of the parent's past income and current circumstances. VA will adjust benefits, or pay benefits, when actual total income for the year is determined. See § 5.535.

(Authority: 38 U.S.C. 1315(f))

§ 5.532 Deductions from income for parent's dependency and indemnity compensation.

(a) Expenses of a business or profession. Necessary business operating expenses are deductible from gross income from a business or profession. Examples include the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income from any other source. For purposes of this section, “business” includes, but is not limited to, the operation of a farm and transactions involving investment property.

(b) Expenses associated with disability, accident, or health insurance recoveries.

VA will deduct from sums recovered under disability, accident, or health insurance medical, legal, or other expenses incident to the insured injury or illness. However, VA will not deduct the same medical expenses under this paragraph (b) and paragraph (d) of this section.

(c) Expenses of a deceased spouse or of the deceased veteran.—(1) Deceased spouse. Amounts a parent pays for the following expenses of a deceased spouse are deductible:

(i) A deceased spouse’s just debts, excluding debts secured by real or personal property.

(ii) The expenses of the spouse’s last illness and burial to the extent such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (see subpart J of this

part concerning VA burial benefits) or 38 U.S.C. chapter 51 (see § 5.551(e) concerning the use of accrued benefits to reimburse the person who bore the expense of a deceased beneficiary's last sickness or burial).

(2) Deceased veteran. Amounts a parent pays for the expenses of the veteran's last illness and burial are deductible to the extent that such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits).

(3) When expenses are deducted. Expenses deductible under this paragraph (c) are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the veteran or spouse died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the parent's advantage.

(4) Proof of expenses. VA will accept as proof of expenses deductible under this paragraph (c) a claimant's statement as to the amount and nature of each expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(d) Unusual medical expenses.—(1) Definitions—(i) Family members. For purposes of this section, a family member is a relative of the parent or parent's spouse, who is a member of the household of the parent or parent's spouse, and whom the parent or parent's spouse has a moral or legal obligation to support. This includes a relative who would normally be a resident of the household, but who is physically absent

due to unusual or unavoidable circumstances, such as a child away at school or a family member confined to a nursing home.

(ii) Unusual medical expenses. For purposes of this section, unusual medical expenses means unreimbursed medical expenses above 5 percent of annual income. For the definition of medical expenses that VA will deduct, see § 5.707.

(2) Expenses of parent and parent's family members. VA will deduct amounts paid by a parent for his or her unusual medical expenses and those of family members.

(3) Expenses of spouse and spouse's family members. VA will deduct the unusual medical expenses of the spouse and the spouse's family members if the combined annual income of the parent and the parent's spouse is the basis for calculating income.

(4) When expenses are deducted. VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) Proof of expenses. VA will accept the claimant's statement as to the amount and nature of each medical expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(6) Estimates of expenses for future benefit periods. For purpose of authorizing prospective payment of benefits, VA may accept a claimant's estimate of future medical expenses based on a clear and reasonable expectation that unusual medical expenditure will be incurred. VA will adjust an award based on such an estimate upon receipt of an amended estimate or upon receipt of an eligibility verification report. See §§ 5.708 and 5.709 concerning requirements for eligibility verification reports.

(e) Certain salary deductions not deductible for determining income. For purposes of determining a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 1315(f))

§ 5.533 Income not counted for parent's dependency and indemnity compensation.

VA will not count payments from the following sources when calculating a parent's income for dependency and indemnity compensation (DIC) purposes:

(a) Death gratuity. Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Pub. L. 102-25, 105 Stat. 82.

(b) Donations received. Donations from public or private relief or welfare organizations, including the following:

(1) The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including money paid to an institution for the care of the parent due to impaired health or advanced age.

(2) Benefits received under noncontributory programs, such as Supplemental Security Income payments.

(c) Certain VA benefit payments. The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, Compensation for Service-Connected Disability or Death.

(2) Payments under 38 U.S.C. chapter 13, Dependency and Indemnity Compensation for Service-Connected Death. However, payments under 38 U.S.C. 1312(a), described in § 5.583 are counted as income.

(3) Nonservice-connected VA disability and death pension payments.

(4) VA benefit payments listed in § 5.472(e).

(d) Certain life insurance payments. Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, or National Service Life Insurance.

(e) Social Security death payments. Lump-sum death payments under title II of the Social Security Act.

(f) State service bonuses. Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) 10 percent of income from retirement plans and similar plans and programs. 10 percent of the amount of payments to a person under public or private retirement,

annuity, endowment, or similar plans or programs is not counted as income under this section. This includes payments for:

(1) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(2) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(3) Retirement benefits received from the Railroad Retirement Board.

(4) Permanent and total disability or death benefits received from the Office of Workers' Compensation Programs of the U.S. Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including damages collected incident to a tort suit under employer's liability law of the U.S. or a political subdivision of the U.S. This ten percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b) concerning expenses associated with disability, accident, or health insurance recoveries.

(5) A commercial annuity, endowment, or life insurance proceeds.

(6) Disability, accident or health insurance proceeds. This ten percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b) concerning expenses associated with disability, accident, or health insurance recoveries.

(h) Casualty loss reimbursement. Reimbursements of any kind for any casualty loss are not counted, but only up to the greater of the fair market value or the

reasonable replacement cost of the property involved immediately preceding the loss. For purposes of this section, a “casualty loss” is the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(i) Profit from sale of non-business property. (1) Profit realized from the sale of real or personal property other than in the course of a business. However, any amounts received in excess of the sale price, such as interest payments, will be counted as income.

(2) If payments are received in installments, the sums received (including principal and interest) will not be counted until the parent has received an amount equal to the sale price. Any amounts received after the sale price has been recovered will be counted as income.

(j) Payment for civic obligations. Payments received for discharge of jury duty or other obligatory civic duties.

(k) Radiation Exposure Compensation Act payments. Payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(l) Ricky Ray Hemophilia Relief Fund payments. Payments under section 103(c)(1) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c-22 (note))

(m) Energy Employees Occupational Illness Compensation Program payments. Payments under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(n) Payments to Aleuts. Payments to certain eligible Aleuts under 50 U.S.C Appx. 1989c-5.

(Authority: 50 U.S.C. Appx. 1989c-5(d)(2))

(o) Increased inventory value of a business. The value of an increase of stock inventory of a business.

(p) Employer contributions. An employer's contributions to health and hospitalization plans for either an active or retired employee.

(q) Other payments. Other payments listed in §§ 5.706 and 5.707.

(Authority: 38 U.S.C. 1315(f))

§ 5.534 When VA counts a parent's income for parent's dependency and indemnity compensation.

(a) General rules. (1) VA counts income on a calendar year basis for purposes of a parent's dependency and indemnity compensation (DIC) benefits.

(2) The calendar year for which VA will count income is the calendar year in which the parent received the income, or anticipates receiving it.

(3) VA will count a parent's total income for the calendar year except as provided in this section.

(b) Exception for first awards and awards following a period of no entitlement - proportionate annual income.—(1) When used. VA will use proportionate annual income for the first award of parent’s DIC, or for resuming payments on an award of a parent's DIC which was discontinued for a reason other than excess income or a change in marital or dependency status, if it is to the parent's advantage. Otherwise, VA will base the award on the parent’s actual total annual income for the entire calendar year.

(2) Proportionate annual income calculation. A proportionate annual income calculation disregards income received, and expenses paid, prior to the effective date of an initial award of parent’s DIC, or prior to the effective date of an award that follows a period of no entitlement for a reason other than excess income or a change in marital or dependency status. In performing a proportionate annual income calculation, VA first determines what the parent's income was for the portion of the calendar year from the effective date of the award of a parent's DIC to the end of the calendar year. VA then

calculates what annual income would have been if income had been received at the same rate for the entire calendar year.

(3) How VA computes proportionate annual income. VA will use the following steps in making the proportionate annual income calculation, rounding the result only at the final step.

(i) Determine income from the effective date of the award of a parent's DIC to the end of the calendar year, disregarding income received and expenses paid before the effective date of the award.

(ii) Divide the result by the number of days from the effective date of the award of parent's DIC to the end of the calendar year.

(iii) Multiply that result by 365. This result, rounded down to the nearest dollar, is the proportionate annual income.

(c) Exception for an increase in income because of a parent's marriage. If a parent marries during the applicable calendar year, income received by the parent's spouse prior to the date of the marriage is not counted.

(Authority: 38 U.S.C. 501(a), 1315(b))

§ 5.535 Adjustments to a parent's dependency and indemnity compensation when income changes.

(a) (1) Applicability. This paragraph (a) applies when, based on anticipated income, VA did not pay parent's DIC for a particular calendar year, or paid less than the

full applicable statutory rate for that particular calendar year, but income for that calendar year was actually less than anticipated.

(2) Retroactive adjustment; income reporting time limitation. VA may retroactively pay a parent's DIC or pay a higher rate of a parent's DIC from the first of the applicable calendar year under the following circumstances:

(i) Satisfactory evidence shows that income was actually less than anticipated for that calendar year; and

(ii) VA receives such evidence no later than the end of the calendar year after the calendar year to which the evidence pertains. Otherwise, payment or increased payments may not be made for the applicable calendar year on the basis of such evidence.

(b) (1) Applicability. This paragraph (b) applies when, based on actual income, VA did not pay a parent's DIC for a particular calendar year, or paid less than the full applicable statutory rate for that particular calendar year, but the parent's income then changes.

(2) Actual income. If VA adjusts a parent's benefits 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.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

CROSS-REFERENCE: Sections 5.708 Eligibility verification reports and 5.709 Claimant and beneficiary responsibility to report changes.

§ 5.536 Parent's dependency and indemnity compensation rates.

(a) Statutory rates. VA pays dependency and indemnity compensation (DIC) to a parent based upon statutory rates that vary depending upon whether both parents are living, upon the parent's marital status, upon whether a parent is legally separated from his or her spouse, and upon whether a parent is a patient in a nursing home, significantly disabled or blind, or so disabled or blind as to require the aid and attendance of another person. These rates are reduced by varying amounts that depend upon the parent's income. See 38 U.S.C. 1315. Rate and income limitations are periodically adjusted whenever there is an increase in benefit amounts payable under title II of the Social Security Act. See 38 U.S.C. 5312(b). In cases based on service in the Commonwealth Army of the Philippines, as a guerrilla, or as a Philippine Scout, see § 5.615 (concerning calculation of the parent's DIC income limitation for claims based on such service).

(b) Use of published rates and income limitations. 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 increases the annual income limitations and the maximum monthly rates of parent's DIC by the same percentage as the Social Security increase. These increases are effective on the same date as the Social Security increase. VA will publish parent's DIC rates, the annual income limitations, and the formulas for adjusting

parent's DIC rates for annual income in the Notices section of the Federal Register when there is a change in the amounts. VA will use this published data in calculating parent's DIC payments. The rates referenced in paragraphs (c) through (e) of this section are the rates specified in the applicable Federal Register notice of an increase in the rates of parent's DIC.

(c) One parent - remarried. Where there is only one parent and that parent has remarried and is living with his or her spouse, VA will pay DIC at the rate for one parent who has not remarried, or the rate applicable to a remarried parent living with his or her spouse, whichever will provide the greater monthly rate of DIC. However, § 5.531(c) (requiring spousal income to be combined) applies in either instance.

(d) One parent – marriage ends or parent is legally separated from spouse. When one parent has remarried and that marriage has ended or the parent is legally separated from his or her spouse, the rate of DIC for that parent will be that which would be payable if there is only one parent alone or two parents not living together, whichever applies.

(e) Two parents living - one parent files DIC application. Where there are two parents of the veteran living and only one parent has filed an application for DIC, the rate of DIC payable to that parent will be that which would be payable to such parent if both parents had filed an application.

(f) Minimum payment. (1) Five dollar minimum. If any payment of a parent's DIC is due after the applicable rate payable is adjusted for income, the amount of that payment will not be less than $5 monthly.

(2) Minimum DIC payment required for special monthly DIC. The special monthly DIC will be paid to a parent who is a patient in a nursing home, is blind, or in need of aid and attendance only if he or she is entitled to at least the minimum DIC payment described in paragraph (f)(1) of this section.

(g) Rate changes due to changes in marital status or living arrangements. If a parent's conditions of entitlement change because of a change in marital status or living arrangements, VA will determine the new rate payable based on the new status. For example, if the parent was unmarried for part of the year, and married for part of the year, VA will pay the applicable rate for an unmarried parent for the part of the year that the parent was unmarried, and then pay the applicable rate for a married parent for the part of the year that the parent was married.

(h) Rates payable when one of two parents receiving death compensation elects DIC.—(1) Parent who elects DIC. The rate of DIC for the parent who elects DIC will not exceed the amount that would be paid to the parent if both parents had elected DIC.

(2) Parent still receiving death compensation. The rate of death compensation for the parent who did not elect DIC will not exceed the amount that would be paid if both parents were receiving death compensation.

(Authority: 38 U.S.C. 501(a), 1315, 5312)

§ 5.537 Payment intervals for parent's dependency and indemnity compensation.

(a) Monthly payments. VA pays parent's dependency and indemnity compensation (DIC) monthly, except as provided in paragraph (b) of this section.

(b) Exception. VA will pay the parent's DIC benefit semiannually, on or about June 1 and December 1, if the amount of the annual benefit is less than four percent of the maximum annual rate payable for that parent. However, a parent receiving payment semiannually may elect to receive payment monthly in cases in which receiving payments semiannually would cause other Federal benefits to be denied.

(Authority: 38 U.S.C. 501(a), 1315)

EFFECTIVE DATES

§ 5.538 Effective date of dependency and indemnity compensation award.

(a) Death in service. The following effective dates apply for dependency and indemnity compensation (DIC) awards based upon a veteran's death in service:

(1) Claim received no later than 1 year after the date of initial report or finding of death. (i) If VA grants DIC based on a claim received no later than 1 year after the date the Secretary concerned makes either an initial report of the veteran's actual death or a finding of the veteran's presumed death in active military service, the effective date is

the first day of the month fixed by that Secretary as the month of death in the report or finding.

(ii) Exception. VA will not pay benefits based on a report of actual death under paragraph (a)(1)(i) of this section for any period for which the claimant received, or was entitled to receive, any of the veteran's following military entitlements: an allowance, an allotment, or service pay.

(2) Claim received more than 1 year after date of initial report or finding of death. If VA grants DIC based on a claim received more than 1 year after the date of the initial report or finding of death described in paragraph (a)(1)(i) of this section, the effective date is the date VA received the claim.

(b) Service-connected death after separation from service. The following effective dates apply for DIC awards based upon a veteran's death after separation from service:

(1) Claim received no later than 1 year after death. If VA grants DIC based on a claim received no later than 1 year after the veteran's death, the effective date is the first day of the month in which the veteran's death occurred.

(2) Claim received more than 1 year after death. If VA grants DIC based on a claim received more than 1 year after the veteran's death, then the effective date is the date VA received the claim.

(c) DIC elected in lieu of death compensation. If VA receives an election of DIC in lieu of death compensation, the award of DIC benefits is effective the date of receipt of the election. See § 5.759.

(d) DIC award to a child. The following effective dates apply for DIC awards to a child:

(1) Claim received no later than 1 year after date entitlement arose. If VA grants DIC based on a claim received no later than 1 year after the date entitlement arose, as defined in § 5.150, the effective date is the first day of the month in which entitlement arose.

(2) Claim received more than 1 year after date entitlement arose. If VA grants DIC based on a claim received more than 1 year after the date entitlement arose, as defined in § 5.150, the effective date is the date VA received the claim, except as otherwise provided in §§ 5.230 and 5.696.

(e) Additional allowance for a child. Any additional allowance awarded for a child is effective on the date the surviving spouse's DIC award is effective, except as otherwise provided in § 5.230.

(Authority: 38 U.S.C. 5110(d)(1), (e)(1), (j))

§ 5.539 Discontinuance of dependency and indemnity compensation to a person no longer recognized as the veteran's surviving spouse.

(a) Discontinuance required. When VA is paying dependency and indemnity compensation (DIC) to one person ("former payee") as a veteran's surviving spouse and another person ("new payee") establishes that he or she is the surviving spouse entitled to that benefit, VA will discontinue payment of DIC to the former payee. For information concerning the effective date of the award of DIC to the new payee, see § 5.538.

(b) Effective date of discontinuance of payments to the former payee. DIC payments to the former payee will be discontinued as follows:

(1) Effective date of discontinuance of payments to a former payee if the new payee's award is effective before VA received the new payee's claim. If the effective date of an award of DIC to the new payee is a date before VA received the new payee's claim, then the award to the former payee will be discontinued on the effective date of the new payee's DIC award.

(2) Effective date of discontinuance of payments to the former payee if the new payee's award is effective on the date VA received the new payee's claim. If the effective date of an award of DIC to the new payee is the date VA received the new payee's claim, then the award to the former payee will be discontinued effective the date of receipt of the new payee's claim or the first day of the month after the month for which VA last paid benefits to the former payee, whichever is later.

(Authority: 38 U.S.C. 5110(a), 5112(a))

§ 5.540 Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved.

(a) General rule. When VA is paying dependency and indemnity compensation (DIC) to a veteran's child and a surviving spouse becomes entitled or loses entitlement, VA will discontinue or adjust payment of DIC as described in this section.

(b) Surviving spouse establishes entitlement. This paragraph (b) applies when a surviving spouse becomes entitled to DIC when VA is already paying DIC to the veteran's child.

(1) Rate for child lower than rate for surviving spouse—(i) Effective date. If a veteran's child received DIC at a rate lower than the rate payable to the surviving spouse, the award of DIC to the surviving spouse is effective the date provided by § 5.538.

(ii) Rate payable to the surviving spouse. The initial amount of DIC payable to the surviving spouse is the difference between the rate paid to the child and the rate payable to the surviving spouse. The full rate will be paid to the surviving spouse effective the first day of the month after the month for which VA last paid benefits to the child.

(2) Rate for child same as or higher than the rate for surviving spouse. If a veteran's child received DIC at a rate equal to or higher than the rate payable to the surviving spouse, the award of DIC to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the child.

(c) Surviving spouse receives dependency and indemnity compensation after his or her entitlement ends and a veteran's child is entitled to DIC. This paragraph (c) applies when a surviving spouse continues to receive DIC after his or her entitlement ends and the veteran's child is entitled to DIC when the surviving spouse's entitlement ends.

(1) Rate for child is lower than rate for surviving spouse. If the veteran's child is entitled to a rate of DIC lower than the rate paid to the surviving spouse, the payments to the surviving spouse will be reduced to the rate payable to the child or children as if there were no surviving spouse. This reduced benefit will be paid effective from the date the surviving spouse's entitlement ends to the first day of the month after the month for which VA last paid benefits to the surviving spouse. The award of DIC to the child is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(2) Rate for child higher than rate for surviving spouse—(i) Effective date of discontinuance of payments to surviving spouse. If the veteran's child is entitled to a rate higher than the rate paid to the surviving spouse, the discontinuation of the award to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(ii) Effective date and rate for child. The award to the veteran's child is effective the day after the end of the surviving spouse's entitlement. The initial amount of DIC payable to the child is the difference between the rate payable to the child and the rate

paid to the surviving spouse. The full rate is payable effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(3) Rate for child same as rate for the surviving spouse—(i) Effective date of discontinuance of benefit to surviving spouse. If the veteran's child is entitled to the same rate as the rate paid to the surviving spouse, the discontinuance of the award to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(ii) Effective date and rate for child. If the veteran's child is entitled to the same rate as the rate paid to the surviving spouse, the award of the full rate to the veteran's child is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

§ 5.541 Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade.

If recertification of a veteran's military pay grade results in reduced dependency and indemnity compensation, VA will reduce the benefit effective the first day of the month after the month for which VA last paid the greater benefit.

(Authority: 38 U.S.C. 501(a), 1311)

§ 5.542 Effective date of an award or an increased rate based on decreased income: parents' dependency and indemnity compensation.

(a) Time limit for receipt of evidence of reduced income. If VA receives evidence of a decrease in expected or actual income before the end of the calendar year after the calendar year to which the evidence pertains, the effective date of an award or increased payment of parents' dependency and indemnity compensation (DIC) based on that evidence will be the date entitlement arose, as defined in § 5.150, but not earlier than the beginning of the calendar year to which the evidence pertains. Otherwise, payment or increased payments may not be made for that calendar year on the basis of such evidence.

(b) Excessive income for a calendar year. Unless paragraph (a) of this section applies, if payments of parents' DIC were not made or if payments were made at a reduced rate for a particular calendar year because income did not permit a higher payment, the effective date of an award or increased payment based on a reduction in income during that calendar year will be the beginning of the next calendar year.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

§ 5.543 Effective date of reduction or discontinuance based on increased income: parents' dependency and indemnity compensation.

(a) Effective-date rule. If VA reduces or discontinues parents' dependency and indemnity compensation (DIC) based on an increase in the parent's expected or actual

income for a particular calendar year, the reduction or discontinuance will be effective the first day of the month after the month in which the income increased or is expected to increase. If VA cannot determine the month in which the income increased or is expected to increase, the effective date of the reduction or discontinuance will be January 1 of the calendar year in which the income increased. If VA later receives evidence showing the month in which the income increased, VA will adjust the effective date accordingly.

(b) Overpayments. If DIC was being paid to two parents living together, and an overpayment is created by the retroactive discontinuance of DIC, then the overpayment will be established on the award of each parent.

(Authority: 38 U.S.C. 501(a), 5112(b)(4))

§ 5.544 Dependency and indemnity compensation rate adjustments when an additional survivor files a claim.

This section does not apply to cases governed by § 5.524.

(a) General rule. If an additional survivor files a claim for dependency and indemnity compensation (DIC) while another survivor is receiving DIC (for example, one or more children are receiving DIC and another child files for DIC) and the additional survivor has apparent entitlement to DIC, then VA will reduce DIC while VA determines the additional survivor's entitlement.

(b) Effective date of reduction of benefits—(1) Benefits payable before filing of claim. If benefits would be payable to the additional survivor from a date before the date VA received the additional survivor's claim, the effective date of any reduction in the benefit will be the date of the additional survivor's potential entitlement.

(2) Benefits payable from the date of application. If benefits would be payable to the additional survivor from the date VA received the additional survivor's claim, VA will reduce the benefit on the later of the following dates:

(i) The date VA received the additional survivor's claim; or

(ii) The first day of the month after the month for which VA last paid benefits to the original survivor.

(c) Effective date of award to additional survivor. If an award for the additional survivor is warranted, the full rate to which the additional survivor is entitled is payable to the additional survivor from the effective date of that award.

(d) Resumption of previous level of payments to other survivors. If entitlement is not established for the additional survivor, benefits to other survivors that were reduced under paragraph (a) of this section will be resumed, if otherwise in order, from the date of the reduction in the benefit.

(Authority: 38 U.S.C. 1313, 5110(a), (e), 5112)

§ 5.545 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.

(a) Effective date of award—(1) General rule. Except as provided in paragraph (a)(2) of this section, the effective date of an award of special monthly dependency and indemnity compensation (DIC) will be the later of:

(i) The date VA receives the claim for special monthly DIC; or

(ii) The date entitlement arose (as defined in § 5.150).

(2) Exception: retroactive award of DIC. When an award of DIC is effective for a period before the date of receipt of the claim and a claimant is also entitled to special monthly DIC at the time of that DIC award, the effective date of special monthly DIC will be the date entitlement to special monthly DIC arose.

(b) Effective date of discontinuance—(1) Aid and attendance. When a parent or surviving spouse is no longer in need of regular aid and attendance, VA will discontinue special monthly DIC based upon the need for regular aid and attendance effective the first day of the month after the month for which VA last paid that benefit.

(2) Housebound. When a surviving spouse is no longer housebound, VA will discontinue special monthly DIC based upon housebound status effective the first day of the month after the month for which VA last paid that benefit.

(c) Special Monthly DIC. Special monthly DIC based on the need for regular aid and attendance is not payable to the surviving parent or surviving spouse while he or she is receiving hospital care as a veteran. VA will resume special monthly DIC based

on the need for regular aid and attendance effective the day that he or she was discharged or released from hospital care. See §§ 5.721 and 5.761.

(Authority: 38 U.S.C. 501(a), 1311(c) and (d), 1315(g), 5110, 5112)

CROSS REFERENCE: § 5.511, Special monthly dependency and indemnity compensation.

§§ 5.546–5.550 [Reserved]

ACCRUED BENEFITS

§ 5.551 Persons entitled to accrued benefits.

(a) Scope. For purposes of entitlement to accrued benefits:

(1) Child. (i) A person claiming entitlement to accrued benefits as a child must, on the date of the deceased beneficiary's death, have met the requirements of § 5.220.

(ii) This paragraph (a)(1)(ii) applies in a claim by a veteran's child who is at least age 18 but not yet age 23 and who was pursuing a course of instruction on the date of the deceased beneficiary's death. If such death occurred during a school vacation period and if school records show that the child was on the school rolls on the last day of the regular school term immediately before the date of the deceased beneficiary's death, then VA will consider the child to have been pursuing a course of instruction on the date of the death.

(2) Dependent parent. A person claiming entitlement to accrued benefits as a dependent parent must, on the date of the veteran's death, have met the requirements of §§ 5.238 and 5.300.

(b) Limitations. This section is subject to §§ 5.565, 5.567, and 5.568, Non-payment of certain benefits upon death of an incompetent veteran. See also § 5.592.

(c) Deceased beneficiary was the veteran.—(1) Order of priority of accrued benefits payments. If the deceased beneficiary was the veteran, accrued benefits are payable to a living person or persons, in the following order of priority:

(i) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse met the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3) does not apply.

(ii) The veteran's surviving children (in equal shares).

(iii) The veteran's surviving dependent parents (in equal shares).

(2) No eligible claimant. If there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(d) Deceased beneficiary was the veteran's spouse—(1) Surviving spouse of a deceased veteran. If the deceased beneficiary was the surviving spouse or remarried surviving spouse of a deceased veteran, then VA may pay accrued benefits to the veteran's children in equal shares. If there is no child, then VA will pay accrued benefits as stated in paragraph (f) of this section.

(2) Spouse of a living veteran. If the deceased beneficiary was the spouse of a living veteran, then VA will pay accrued benefits as stated in paragraph (f) of this section.

(e) Deceased beneficiary was the veteran's child—(1) General rule. If the deceased beneficiary was the veteran's child, then VA may pay accrued benefits to the veteran's surviving child who is entitled to death pension or dependency and indemnity compensation. If there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(2) Surviving child who elected 38 U.S.C. chapter 35 educational benefits. A surviving child who has elected survivors' and dependents' educational assistance under 38 U.S.C. chapter 35 may receive benefits under paragraph (e)(1) of this section for periods before the beginning of benefits under chapter 35.

(3) Deceased child's 38 U.S.C. chapter 18 benefits. If a child claiming benefits under 38 U.S.C. chapter 18 dies, any accrued benefits resulting from such a claim are payable to the child's surviving parent. If there is no surviving parent, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(f) No eligible claimant. If there is no eligible claimant under paragraphs (c) through (e) of this section, then VA may pay accrued benefits to the person who bore the expense of the deceased beneficiary's last sickness or burial, but only to the extent necessary to reimburse that person for such expense. VA will not pay accrued benefits to any political subdivision of the U.S.

(g) Effect of failure to claim accrued benefits, or waiver of benefits, on rights of another claimant.—(1) Person with higher priority. If there is a living person with a higher priority when the beneficiary dies, VA will not pay accrued benefits to any person with a lower priority unless, no later than 1 year after the deceased beneficiary's death, the person with a higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay accrued benefits to the person next in priority if that person files a timely claim.

(2) Person within a category of potential claimants. If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of accrued benefits to anyone else within that category unless, no later than 1 year after the deceased beneficiary's death, that person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimant must file a timely claim.

(3) Applicability of paragraph (g). Paragraphs (g)(1) and (2) of this section apply even if the "living person" referred to in those paragraphs fails to file a timely claim or waives rights to accrued benefits.

(Authority: 38 U.S.C. 101(4)(A), 501(a), 5121(a); Sec. 104, Pub. L. 108-183, 117 Stat. 2656)

CROSS REFERENCE: § 5.1, for the definition of "political subdivision of the U.S."; § 5.784, Special rules for apportioned benefits on death of beneficiary or apportionee.

§ 5.552 Claims for accrued benefits.

(a) Time limit for filing. A claim for accrued benefits must be filed no later than 1 year after the date of the deceased beneficiary's death.

(b) Other claims accepted as a claim for accrued benefits. A claim filed with VA by, for, or on behalf of, an apportionee, surviving spouse, child, or parent for either of the following benefits will also be accepted as a claim for accrued benefits:

(1) Death pension; or

(2) Dependency and indemnity compensation.

(Authority: 38 U.S.C. 5101(b), 5121(c))

§ 5.553 Notice of incomplete applications for accrued benefits.

If an application for accrued benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of persons eligible for benefits under § 5.551, and if the claimant might be entitled to payment of any benefits that may have accrued, then VA will notify the claimant:

(a) Of the type of information required to complete the application;

(b) That VA will take no further action on the claim unless VA receives the required information; and

(c) That if VA does not receive the required information no later than 1 year after the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

(Authority: 38 U.S.C. 5121(c))

§ 5.554 Benefits payable as accrued benefits.

(a) Qualifying benefits. VA may pay the following benefits as accrued benefits:

(1) Clothing allowance under 38 U.S.C. 1162;

(2) Service-connected disability compensation under 38 U.S.C. chapter 11;

(3) Dependency and indemnity compensation under 38 U.S.C. chapter 13;

(4) Survivors' and dependents' educational assistance allowance or special restorative training allowance under 38 U.S.C. chapter 35;

(5) Medal of Honor pension under 38 U.S.C. 1562;

(6) Monetary benefits for an eligible child under 38 U.S.C. chapter 18;

(7) Pension, including death pension under 38 U.S.C. chapter 15;

(8) Restored Entitlement Program for Survivors (REPS) benefits (Sec. 156, Public Law 97-377, 96 Stat.1920-22);

(9) Subsistence allowance under 38 U.S.C. chapter 31; and

(10) Veterans' educational assistance under 38 U.S.C. chapter 30, 32, or 34 or 10 U.S.C. chapter 1606 or 1607.

(b) Non-qualifying benefits. VA cannot pay the following benefits as accrued benefits:

(1) Assistance in acquiring automobiles and adaptive equipment under 38 U.S.C. chapter 39;

(2) Assistance in acquiring specially adapted housing under 38 U.S.C. chapter 21;

(3) Insurance under 38 U.S.C. chapter 19;

(4) Naval pension under 10 U.S.C. 6160; and

(5) Special allowance under 38 U.S.C. 1312(a).

(Authority: 38 U.S.C. 5121(a))

§ 5.555 Relationship between accrued-benefits claims and claims filed by the deceased beneficiary.

(a) Claim for accrued benefits results from the deceased beneficiary's entitlement. A claim for accrued benefits is an original claim, and is separate from any claim filed during the deceased beneficiary's lifetime, notwithstanding that the claimant's entitlement to accrued-benefits depends on the deceased beneficiary's entitlement.

(b) Accrued-benefits claimant bound by existing decisions. A claimant for accrued benefits is bound by any existing benefits decision(s) on claims by the deceased beneficiary concerning those benefits to the same extent that the deceased beneficiary was (or would have been) bound by such decision(s).

(Authority: 38 U.S.C. 501(a), 5101, 5121, 7104(b), 7105(c))

§§ 5.556–5.563 [Reserved]

SPECIAL PROVISIONS

§ 5.564 Cancellation of checks mailed to a deceased payee; payment of such funds as accrued benefits.

(a) Disposition of checks mailed to a deceased payee: general rules—(1) VA benefit checks not negotiated by a deceased payee must be returned. Upon the death of a beneficiary, unnegotiated VA benefit checks must be returned to the issuing office and canceled, subject to § 5.695 (permitting, under specific circumstances, a surviving spouse to negotiate a check for the month in which the veteran died). Upon their return, funds represented by such checks may be paid under paragraph (a)(2) of this section.

(2) Payment of benefits where a deceased payee died on or after the last day of the period covered by the check. If the payee died on or after the last day of the period covered by the returned check(s), VA will pay the amount represented on the returned check (or any amount recovered by VA after improper negotiation of such check(s)), to the payee's survivor under § 5.551(b) through (e), irrespective of whether the survivor files a claim. Any amount not paid in this manner will be paid to the estate of the deceased beneficiary, provided that the estate will not escheat (that is, revert to a governmental entity).

(3) Deceased payee was not alive on the last day of the period covered by the check. If the payee was not alive on the last day of the period covered by the check, such funds cannot be paid under this section.

(b) Payment to a claimant having a lower order of priority. If a survivor having a higher order of priority dies, then VA will pay a claimant having a lower order of priority under § 5.551(b) through (e), Persons entitled to accrued benefits, as applicable, if it is shown that the person or persons having a higher order of priority are deceased at the time the claim is adjudicated.

(c) Payment of amounts withheld during hospitalization. This section does not apply to checks for lump sums representing amounts withheld under § 3.551(b) of this chapter as in effect prior to the applicability date of this part 5 or § 5.727, or withheld before December 27, 2001, under former § 3.557 of this chapter (which concerned reduction of benefits when an incompetent veteran is hospitalized). These amounts are governed by §§ 5.567 and 5.568.

(Authority: 38 U.S.C. 501(a), 5122; Sec. 306, Pub. L. 95-588, 92 Stat. 2497)

§ 5.565 Special rules for payment of benefits on deposit in a special deposit account when a payee living in a foreign country dies.

(a) Purpose. Benefit payments will not be sent to a payee living in a foreign country if the Secretary of the Treasury determines that there is no reasonable

assurance the payee will receive the benefit check or will be able to negotiate it for full value. See §§ 5.714 and 5.715. Up to $1,000 of such benefit payments may be deposited in an account entitled “Secretary of the Treasury, Proceeds of Withheld Foreign Checks” (special deposit account). This section describes who is entitled to the funds in that account when the payee dies, when to file a claim for those funds, and certain restrictions on payment.

(b) Persons entitled to funds in special deposit account upon death of payee. When the payee of a check for pension or disability compensation dies, the deceased payee’s funds in the special deposit account are payable as follows:

(1) If the deceased payee was the veteran, to the surviving spouse or, if there is no surviving spouse, to children of the veteran under 18 years of age on the date of the veteran's death in equal shares;

(2) If the deceased payee was the veteran’s surviving spouse, to children of the spouse under 18 years of age on the date of the spouse's death in equal shares;

(3) If the deceased payee was the recipient of an apportioned share of the veteran's pension or disability compensation, to the veteran to the extent the special deposit account consists of such apportionment payments; or

(4) In any other case, to the person who bore the expense of the burial of the payee, but only to the extent necessary to reimburse that person for such expenses.

(c) Time limit for filing claims and evidence. (1) A claim for the funds in the special deposit account must be received by VA no later than 1 year after the date of the payee's death.

(2) The claimant must file necessary evidence in support of the claim no later than 6 months after the date VA requests that evidence.

(d) Other restrictions. (1) Payment made under this section is limited to amounts due on the date of the payee's death under decisions existing on the date of the death.

(2) Payment will be made under this section only if both the deceased beneficiary and the claimant have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or an enemy of any ally of the U.S.

(Authority: 31 U.S.C. 3329, 3330; 38 U.S.C. 5309)

§ 5.566 Special rules for payment of all benefits except insurance payments deposited in a personal-funds-of-patients account when an incompetent veteran dies.

(a) Purpose. This section provides rules relating to the disposition of certain funds on deposit in a personal-funds-of-patients (PFOP) account for a veteran who was incompetent at the date of his or her death and who died after November 30, 1959.

(b) Funds included. The funds included are those on deposit in the PFOP account on the date of the veteran's death that were derived from any benefits except

insurance payments deposited in the account by VA. Funds derived from such deposits are those that resulted from the VA deposits, even though there may have been an intervening change in the form of the asset. For example, if amounts representing any benefits except insurance payments deposited by VA are withdrawn to purchase bonds on the veteran's behalf and redeposited upon the maturity of the bonds, an amount equal to the amount withdrawn for the purchase will be considered as derived from the deposits.

(c) Funds excluded. This section does not apply to the disposition of:

(1) Amounts resulting from funds deposited in the PFOP account by the veteran or others besides VA, regardless of the source of the deposit; or

(2) Amounts, such as interest, representing an increase in the value of funds originally deposited by VA.

(d) Eligible persons. The funds described in paragraph (b) of this section will be paid to a person, or persons, living at the time of settlement (that is, when VA pays out the PFOP account) in the following priority:

(1) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse meets the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3) does not apply.

(2) The veteran's surviving children, as defined in § 5.220 in equal shares, but without regard to their age or marital status.

(3) The veteran's parents, as defined in § 5.238, who on the date of the veteran's death were dependent within the meaning of § 5.300, in equal shares.

(4) If no recipient listed in paragraphs (d)(1) through (3) of this section is living at the time of settlement, the person who bore the expense of the veteran's last sickness or burial, but only to the extent necessary to reimburse that person for such expense.

(e) Claims for funds governed by this section—(1) Time limit for filing. A person eligible for the funds governed by this section must file a claim for the funds with VA no later than 5 years after the death of the veteran. However, if any person otherwise entitled is under legal disability on the date of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(2) Submission of evidence. There is no time limit for filing evidence of entitlement to the funds governed by this section.

(3) Effect of failure to claim funds, or waiver of claim, on rights of another claimant. (i) If there is a living person with a higher priority, VA will not pay funds governed by this section to any person with a lower priority unless, within 5 years after the veteran's death, the person with higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay such funds to the person next in priority if that person files a timely claim.

(ii) If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of funds governed by this section to anyone else within that category unless, within 5 years after the veteran's death, that

person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimants must file timely claims.

(iii) Paragraphs (e)(3)(i) and (ii) apply even if the "living person" referred to in those paragraphs fails to file a timely claim or waives rights to funds governed by this section.

(Authority: 38 U.S.C. 5502(d))

§ 5.567 Special rules for payment of Old-Law Pension when a hospitalized competent veteran dies.

(a) Basic entitlement. Amounts withheld on a running award of Old-Law Pension, under the provisions of § 3.551(b) of this chapter as in effect before the applicability date of this part 5 or under § 5.727, are payable in a lump sum after a competent veteran's death, if the amounts were not paid to the veteran under § 5.730. The lump sum is payable only to the living person first listed below:

(1) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse meets the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3), does not apply.

(2) The veteran's surviving children, as defined in § 5.220 in equal shares, but without regard to their age or marital status.

(3) The veteran's parents, as defined in § 5.238, who on the date of the veteran's death were dependent within the meaning of § 5.300, in equal shares.

(4) If no recipient listed in paragraphs (a)(1) through (3) of this section is living at the time of settlement, the person who bore the expense of the veteran's last sickness or burial, but only to the extent necessary to reimburse that person for such expense.

(b) Claims for funds governed by this section—(1) Time limit for filing. A person eligible for the funds governed by this section must file a claim for the funds with VA no later than 5 years after the death of the veteran. However, if any person otherwise entitled is under legal disability on the date of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(2) Submission of evidence. There is no time limit for filing evidence of entitlement to the funds governed by this section.

(3) Effect of failure to claim funds, or waiver of claim, on rights of another claimant.—(i) Person with higher priority. If there is a living person with a higher priority, VA will not pay funds governed by this section to any person with a lower priority unless, within 5 years after the veteran's death, the person with a higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay such funds to the person next in priority if that person files a timely claim.

(ii) Person within a category of potential claimants. If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of funds governed by this section to anyone else within that category unless, within 5 years after the veteran's death, that person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimants must file timely claims.

(iii) Applicability of paragraph (b)(3). Paragraphs (b)(3)(i) and (ii) of this section apply even if the "living person" referred to in those paragraphs fails to file a timely claim or waives rights to funds governed by this section.

(c) Lump sum withheld after discharge from institution. The provisions of paragraphs (a) and (b) of this section will apply even in the event of the death of any veteran prior to receiving a lump sum that was withheld because treatment or care was terminated against medical advice or as the result of disciplinary action.

(d) VA benefit checks not negotiated by a deceased payee. The provisions of paragraphs (a) and (b) of this section will apply even in cases in which a check was issued and the veteran died before negotiating the check.

(Authority: Sec. 306, Pub. L. 95-588, 92 Stat. 2497)

§ 5.568 Non-payment of certain benefits upon death of an incompetent veteran.

(a) Old-Law Pension. If an award of Old-Law Pension for an incompetent veteran was reduced under § 3.551(b) of this chapter as in effect before the applicability date of this part 5 or § 5.727, and the veteran dies before payment of amounts withheld or not paid, no part of such amount will be paid to any person.

(b) Award of disability pension, disability compensation, or emergency officers' retired pay. If VA discontinued an award of disability pension, disability compensation,

or emergency officers' retired pay under former § 3.557(b) of this part (as applicable prior to December 27, 2001) because the veteran was hospitalized by the U.S. or a political subdivision and had an estate which equaled or exceeded the statutory maximum and the veteran dies before payment of amounts withheld or not paid because of such care, VA will pay no part of such amount to any person.

(c) Applicability. The provisions of this section apply to amounts withheld for periods prior to, as well as subsequent to, the VA's determination 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, as in effect prior to December 27, 2001; Sec. 306, Pub. L. 95-588, 92 Stat. 2497)

CROSS REFERENCE: § 5.1, for the definition of "political subdivision of the U.S."

§§ 5.569–5.579 [Reserved]

Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors

SPECIAL BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS

§ 5.580 Medal of Honor pension.

(a) Placement on the Medal of Honor Roll. The Secretaries of the Departments of the Army, Navy, Air Force, and Homeland Security determine entitlement to placement on the Medal of Honor Roll and issue certificates setting forth the right to receive Medal of Honor pension. VA will pay the Medal of Honor pension after the Secretary concerned delivers VA a certified copy of the certificate.

(b) Amount and effective date of Medal of Honor pension and entitlement to a retroactive lump-sum payment—(1) Effective date of monthly pension. The effective date of monthly payment of a Medal of Honor pension is the date the service department concerned received the servicemember's or veteran's form requesting placement on the Medal of Honor Roll.

(2) Monthly rate. VA will pay a Medal of Honor pension at the rate specified in 38 U.S.C. 1562, as adjusted under paragraph (c)(4) of this section.

(3) Retroactive lump-sum payment. VA will pay to each servicemember or veteran who receives a Medal of Honor pension, a retroactive lump-sum payment for the period beginning the first day of the month after the date of the event for which the veteran earned the Medal of Honor, and ending on the last day of the month before the month in which the pension commenced under paragraph (b)(1) of this section. VA will calculate the amount of the lump-sum payment using the Medal of Honor pension rates in effect for each year of the period for which the retroactive payment is made.

(4) Automatic annual adjustment. VA will, effective December 1 of each year, increase the monthly Medal of Honor pension by the same percentage by which benefit amounts payable under Title II of the Social Security Act are increased effective

December 1 of that year. The current and historic rates are located on the Internet at http://www.va.gov and are available from any VA regional office.

(c) Medal of Honor pension exempt from offset, attachment, or other legal process. The Medal of Honor pension is paid in addition to all other payments under laws of the U.S. It is not subject to any attachment, execution, levy, tax lien, or detention under any process whatever.

(d) Only one Medal of Honor pension is allowed. VA will pay a servicemember or veteran only one Medal of Honor pension under this section, even if the servicemember or veteran is awarded more than one Medal of Honor.

(Authority: 38 U.S.C. 1560, 1561, 1562)

§ 5.581 Awards of benefits based on special acts or private laws.

(a) Special act means an act of Congress that authorizes VA to pay benefits to a particular person. Special acts are also known as private laws.

(b) Claim must be filed. VA will grant benefits based on a special act only to a person who files a claim based on the special act, unless the person:

(1) Is currently receiving benefits; or

(2) Has a pending claim for any benefit at the time that the special act becomes effective.

(c) Special acts relating to military service—(1) Change to character of discharge or release. If a special act corrects the character of discharge or release from military service and does not grant pension or disability compensation directly, the claimant acquires veteran status and may apply for and be granted benefits.

(2) Special act as conclusive proof of service. For VA purposes, a special act that states a veteran's service began on a particular date or dates and that the veteran was discharged under conditions other than dishonorable on a particular date is conclusive proof of such service.

(d) Rate, effective date, and duration of benefit. (1) VA will apply the rate, effective date, and discontinuance date specified in a special act, except as provided in paragraph (e) of this section.

(2) When a special act does not provide the effective date VA will determine the effective date according to § 5.152.

(e) Changes in rates—(1) Hospital care. VA will adjust pension payable under a special act, pursuant to §§ 5.720 through 5.723, 5.726, and 5.728 (reduction of payments based on hospital, domiciliary, or nursing home care), unless the special act expressly prohibits such reduction.

(2) Incarceration and fugitive felon. VA will adjust disability compensation and pension payable under a special act, pursuant to §§ 5.810 through 5.815, and 5.817

(reduction of payments during incarceration or suspension of payments while a fugitive felon), unless the special act expressly prohibits such reduction.

(f) Prohibition against duplicate awards. When pension or disability compensation is authorized by a special act, VA will not pay any other pension or disability compensation to the extent such awards would be duplicative under 38 U.S.C. 5304, unless the payee makes an election or unless the special act expressly authorizes VA to do so. See §§ 5.24(c)(3), 5.464, 5.746, 5.747, 5.756, 5.761, and 5.762.

(Authority: 38 U.S.C. 501(a), 1505, 5313, 5313B, 5503)

§ 5.582 Naval pension.

(a) Certification. VA will pay naval pension if the Secretary of the Navy certifies that the person is entitled to the pension.

(b) Concurrent receipt of awards in effect before July 14, 1943. Awards of naval pension in effect before July 14, 1943, or renewed or continued awards may be paid concurrently with VA pension or disability compensation; however, naval pension allowance under 10 U.S.C. 6160 may not exceed one-fourth of the rate of VA pension or disability compensation otherwise payable, exclusive of additional allowances for dependents or specific disabilities.

(c) No concurrent receipt of awards initially made after July 13, 1943. Naval pension initially awarded after July 13, 1943, may not be paid concurrently with VA pension or disability compensation.

(d) Naval pension not payable as accrued benefit. Naval pension remaining unpaid at the date of the veteran's death is not payable by VA as an accrued benefit.

(Authority: 10 U.S.C. 1414, 6160; 38 U.S.C. 5304)

§ 5.583 Special allowance under 38 U.S.C. 1312.

(a) Allowance payable. This section applies to VA payment of a special allowance to the surviving dependent of a veteran who:

(1) Served after September 15, 1940;

(2) Died after December 31, 1956, as a result of such service; and

(3) Was not a fully and currently insured person under title II of the Social Security Act.

(b) Allowance not payable. The special allowance is not payable:

(1) Where the veteran's death is not service connected but is treated “as if” it were service connected under the provisions of 38 U.S.C. 1151. See § 5.510(b)(2) and (3); or

(2) Where the veteran's death was due to service in 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 in the New Philippine Scouts under sec. 14 of Public Law 79-190, 59 Stat. 543.

(c) Claims for special allowance. A claim for dependency and indemnity compensation will be accepted as a claim for the special allowance where VA determines that the special allowance is payable or where VA receives a specific inquiry concerning entitlement to the special allowance.

(d) Certification by the Social Security Administration. Payment of this special allowance will be authorized on the basis of a certification from the Social Security Administration, after VA receives a claim. 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) Special allowance payable on death. (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 (regardless of whether the death occurred in the line of duty); or

(ii) As the result of a service-connected disability incurred after September 15, 1940.

(2) Where the veteran died after separation from service:

(i) Discharge from service must have been under conditions other than dishonorable, as outlined in § 5.30; and

(ii) Line of duty and service connection will be determined as outlined in Subpart K, Matters Affecting the Receipt of Benefits, of this part.

(Authority: 38 U.S.C. 107, 1312)

CROSS REFERENCE: § 5.1, for the definition of “uniformed services”.

§ 5.584 Loan guaranty for a surviving spouse: eligibility requirements.

VA will provide a certification of loan guaranty benefits to a surviving spouse based on a claim filed after December 31, 1958, if all of the following conditions are met:

(a) The veteran served in the Armed Forces of the U.S. (Allied Nations are not included) at any time after September 15, 1940;

(b)(1) The veteran died in service; or

(2) The veteran died after separation from service and the 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 the line of duty rendered after September 15, 1940, regardless of the date of entrance into such service (cases where the veteran's death is not service connected but is treated “as if” it were service

connected, under 38 U.S.C. 1318, or where disability compensation is payable because of death resulting from hospitalization, treatment, examination, or training, under 38 U.S.C. 1151, are not included);

(c) The surviving spouse meets the requirements of the term "surviving spouse" as outlined in § 5.200(a);

(d) The surviving spouse is unmarried or remarried after reaching age 57; and

(e) The surviving spouse is not eligible for a loan guaranty certification as a veteran in his or her own right.

(Authority: 38 U.S.C. 3701(b)(2))

§ 5.585 Certification for death gratuity.

Section 1476, title 10 United States Code authorizes a service department to pay a death gratuity for death of a servicemember after discharge or release from training. Entitlement to the death gratuity is contingent upon the findings in this section, certified by the Secretary of Veterans Affairs to the Secretaries of the Departments of the Army, Navy, Air Force, or Homeland Security.

(a) Certification by VA to the Secretary concerned. If VA determines, either on the basis of a claim for benefits or at the request of the Secretary concerned, that a

death occurred under the following circumstances, VA will certify to the Secretary concerned:

(1) The veteran died after December 31, 1956;

(2) The veteran died during the 120-day period that began on the day after the day of his or her discharge or release from duty as described in 10 U.S.C. 1476;

(3) Death resulted from injury or disease incurred or aggravated while on such duty, or travel to or from such duty; and

(4) The veteran was discharged or released from such service under conditions other than dishonorable.

(b) VA law applies. VA will apply the standards, criteria, and procedures for determining the incurrence or aggravation of an injury or disease under paragraph (a) of this section under the disability compensation laws administered by VA, except that there is no requirement under this section that any incurrence or aggravation was in the line of duty.

(Authority: 10 U.S.C. 1476; 38 U.S.C. 1323)

§ 5.586 Certification for dependents' educational assistance.

(a) Eligibility for dependents' educational assistance (DEA). DEA is an education benefit, payable to a veteran's spouse, surviving spouse, or child, that VA is authorized to provide for certain classes, licenses, or certifications. See §§ 21.3020 through 21.3344 of this chapter. In addition to paragraphs (b) through (d) of this

section, § 21.3021 of this chapter will be applied in a determination of eligibility for DEA. For purposes of this section, the term child means a veteran's child who meets the requirements of § 5.220, except as to age and marital status.

(b) Service connection. 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.

(c) Disabilities treated as if service connected—(1) Paired organs or extremities. For purposes of eligibility for DEA, a "service-connected disability" includes a disability treated as if service connected under § 5.282.

(2) Disability due to hospitalization, etc. For purposes of eligibility for DEA, a "service-connected disability" does not include a disability treated as if service connected under § 5.350.

(Authority: 38 U.S.C. 3501(a))

§ 5.587 Minimum income annuity and gratuitous annuity.

(a) Eligibility for minimum income annuity. The minimum income annuity authorized by Public Law 92-425, 86 Stat. 706, as amended, is payable to a person:

(1) Who the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, or the Department of Commerce has

determined meets the eligibility criteria of sec. 4(a) of Public Law 92-425, 86 Stat. 712, as amended, other than sec. 4(a)(1) and (2);

(2) Who is eligible for pension under subchapter III of 38 U.S.C. chapter 15, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978; and

(3) Whose annual income, as determined in establishing pension eligibility, is less than the maximum annual rate of pension in effect under 38 U.S.C. 1541(b).

(b) Calculation of the minimum income annuity payment—(1) Annual income. VA will determine a beneficiary's annual income for minimum income annuity purposes under the provisions of §§ 5.370, 5.410 through 5.413, and 5.423 for beneficiaries receiving Improved Pension, or under §§ 5.472 through 5.474 for beneficiaries receiving Old-Law Pension or Section 306 Pension, except that VA will exclude the amount of the minimum income annuity from the calculation.

(2) Determining rate of annuity for a person entitled to Improved Pension. VA will determine the minimum income annuity payment for a beneficiary entitled to Improved Pension by subtracting the annual income for minimum income annuity purposes from the maximum annual pension rate under 38 U.S.C. 1541(b).

(3) Determining rate of annuity for a person entitled to Old-Law Pension and Section 306 Pension. VA will determine the minimum income annuity payment for a beneficiary receiving Old-Law Pension and Section 306 Pension by reducing the maximum annual pension rate under 38 U.S.C. 1541(b) by the amount of the Retired Servicemen's Family Protection Plan benefit, if any, that the beneficiary receives and subtracting from that amount the annual income for minimum income annuity purposes.

(4) Recalculation. VA will recalculate the monthly minimum income annuity payment whenever there is a change to the maximum annual rate of pension in effect under 38 U.S.C. 1541(b), and whenever there is a change in the beneficiary's income.

(c) Exception as to the requirement of pension eligibility. A person otherwise eligible for pension under subchapter III of 38 U.S.C. chapter 15, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978, will still be considered eligible for pension for purposes of determining eligibility for the minimum income annuity, even though no amount of pension is payable after adding the minimum income annuity, authorized under Public Law 92-425, 86 Stat. 706, as amended, to any other countable income.

(d) Concurrent receipt of gratuitous annuity under Public Law 100-456. If the Department of Defense or the Department of Homeland Security, the Department of Health and Human Services, or the Department of Commerce determines that a minimum income annuitant also is entitled to the gratuitous annuity authorized by Public Law 100-456, 102 Stat. 1918, as amended, which is payable to certain surviving spouses of servicemembers who died before November 1, 1953, and were entitled to retired or retainer pay on the date of death, VA will combine the payment of the gratuitous annuity with the minimum income annuity payment.

(e) Discontinuance. Other than as provided in paragraph (c) of this section, if a beneficiary receiving the minimum income annuity becomes ineligible for pension, VA will discontinue the minimum income annuity effective the same date.

(Authority: Sec. 4, Pub. L. 92-425, 86 Stat. 706, 712, as amended (10 U.S.C. 1448 note); Sec. 653, Pub. L. 100-456, 102 Stat. 1918, 1991, as amended (10 U.S.C. 1448 note))

§ 5.588 Special allowance payable under section 156 of Public Law 97-377.

A surviving spouse or child of a veteran who either died on active duty before August 13, 1981, or died as a result of a service-connected disability that was incurred or aggravated before August 13, 1981, may be entitled to receive a special allowance to replace social security benefits that were reduced or discontinued by the Omnibus Budget Reconciliation Act of 1981.

(a) Eligibility requirements.—(1) Determination on how death occurred. VA must first determine that the person on whose earnings record the claim is based either died on active duty before August 13, 1981, or died as a result of a service-connected disability that was incurred or aggravated before August 13, 1981. For purposes of this determination, character of discharge is not a factor for consideration and death on active duty after August 12, 1981, is qualifying provided that the death resulted from a service-connected disability that was incurred or aggravated before August 13, 1981.

(2) Determination under Public Law 97-377. Once a favorable determination has been made under paragraph (a)(1) of this section, VA will make determinations as to the age, relationship, and school-attendance requirements contained in paragraphs (a)(1) and (b)(1) of sec. 156 of Public Law 97-377, 96 Stat. 1920. In making these eligibility determinations, VA will 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 that VA cannot appropriately resolve under the provisions of the Social Security Act, or the regulations promulgated pursuant to the Social Security Act, the provisions of title 38, Code of Federal Regulations, are applicable.

(b) Calculation of payment rate—(1) Basic entitlement rate. A basic entitlement rate will be calculated for each eligible claimant in accordance with the provisions of paragraphs (a)(2) and (b)(2) of sec. 156 of Public Law 97-377, 96 Stat. 1920, using data to be provided by the Social Security Administration. This basic entitlement rate will then be used to calculate the monthly payment rate as described in paragraphs (b)(2) through (6) of this section.

(2) Original or reopened awards to a surviving spouse. The monthly payment rate will 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 a child. The monthly payment rate will 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 the special allowance payable to a surviving spouse will 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 the special allowance payable to a child will 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 will 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 his or her status or employment that affects eligibility or entitlement.

(6) Rounding of monthly rates. Any monthly rate calculated under the provisions of this paragraph (b), if not a multiple of $1, will be rounded to the next lower multiple of $1.

(c) Claimant not entitled to this special allowance. The following persons are not entitled to this special allowance for the reasons indicated:

(1) A claimant eligible for death benefits under 38 U.S.C. 1151. The death in such a case is not service connected.

(2) A claimant eligible for death benefits under 38 U.S.C. 1318. The death in such a case is not service connected.

(3) A claimant whose claim is based on a person'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 New Philippine Scouts under sec. 14 of Public Law 79-190, 59 Stat. 543 (see 38 U.S.C. 107);

(iii) The commissioned corps of the Public Health Service (specifically excluded by sec. 156, Public Law 97-377, 96 Stat. 1920); or

(iv) The National Oceanic and Atmospheric Administration (specifically excluded by sec. 156, Public Law 97-377, 96 Stat. 1920).

(d) Appellate jurisdiction. VA has appellate jurisdiction of all determinations made in connection with this special allowance.

(e) Claims. A claimant for this special allowance must file an application. If VA receives an informal communication from a claimant about this special allowance, VA will forward an application to the claimant.

(f) Retroactivity and effective dates. There is no time limit for filing a claim for this special allowance. Upon the filing of a claim, the effective date of an award or increased award of benefits begins 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 before January 1, 1983.

(Authority: Sec. 156, Pub. L. 97-377, 96 Stat. 1920)

§ 5.589 Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.

(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 as determined under paragraph (d) of this section, to or for a person who VA has determined to be a person suffering from spina bifida whose biological mother or father is or was a Vietnam veteran or a veteran with covered service in Korea. A person suffering from spina bifida is entitled to only one monthly allowance under this section, even if each of the person's biological parents is or was Vietnam veterans or veterans with covered service in Korea. Whenever there is a cost-of-living increase in benefit

amounts payable under section 215(i) of Title II of the Social Security Act, VA will, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18.

(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 person, or the right of any claimant or beneficiary, to receive any other benefit to which he or she may be entitled under any law administered by VA.

(c) Definitions—(1) Vietnam veteran. For purposes of this section, the term Vietnam veteran means a person who performed active military service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to the person's character of discharge. For the definition of "service in the Republic of Vietnam," see § 5.262(a)(1).

(2) Veteran with covered service in Korea. For purposes of this section, the term veteran with covered service in Korea means a person who served in the active military service in or near the Korean Demilitarized Zone ("DMZ") between September 1, 1967, and August 31, 1971, and who is determined by VA, in consultation with the Department of Defense, to have been exposed to an herbicide agent during such service. Exposure to an herbicide agent will be conceded if the veteran served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been

applied during that period, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(3) Person. For purposes of this section, the term person means a person, regardless of age or marital status, whose biological father or mother is or was a Vietnam veteran or a veteran with covered service in Korea and who was conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era or had covered service in Korea. Notwithstanding the provisions of § 5.181(b), VA will require the types of evidence specified in §§ 5.221 and 5.229 to establish that a person is the biological son or daughter of a Vietnam veteran or a veteran with covered service in Korea.

(4) Spina bifida. For purposes of this section, the term spina bifida means any form and manifestation of spina bifida except spina bifida occulta.

(d) Disability ratings. (1) Determining the level of payment. Except as otherwise specified in this paragraph (d), VA will determine the level of payment as follows:

(i) Level I. The person walks without braces or other external support as his or her primary means of mobility in the community, has no sensory or motor impairment of the upper extremities, has an IQ of 90 or higher, and is continent of urine and feces without the use of medication or other means to control incontinence.

(ii) Level II. Provided that none of the disabilities is severe enough to warrant payment at Level III, and the person:

(A) Walks with braces or other external support as his or her primary means of mobility in the community;

(B) Has sensory or motor impairment of the upper extremities, but is able to grasp a pen, feed himself or herself, and perform self care;

(C) Has an IQ of at least 70 but less than 90;

(D) Requires medication or other means to control the effects of urinary bladder impairment and no more than two times per week is unable to remain dry for at least 3 hours at a time during waking hours;

(E) Requires bowel management techniques or other treatment to control the effects of bowel impairment, but does not have fecal leakage severe or frequent enough to require wearing of absorbent materials at least 4 days a week; or

(F) Has a colostomy that does not require wearing a bag.

(iii) Level III.

(A) The person uses a wheelchair as his or her primary means of mobility in the community;

(B) Has sensory or motor impairment of the upper extremities severe enough to prevent grasping a pen, feeding himself or herself, and performing self care;

(C) Has an IQ of 69 or less;

(D) Despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for 3 hours at a time during waking hours;

(E) Despite bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage severe or frequent enough to require wearing of absorbent materials at least 4 days a week;

(F) Regularly requires manual evacuation or digital stimulation to empty the bowel; or

(G) Has a colostomy that requires wearing a bag.

(2) Ratings by Director of the Compensation Service. If a person who would otherwise be paid at Level I or II has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida, or from treatment procedures for spina bifida, the Director of the Compensation Service may increase the monthly payment to the level that, in his or her judgment, best represents the extent to which the disabilities resulting from spina bifida limit the person's ability to engage in ordinary day-to-day activities, including, but not limited to, activities outside his or her residence. A Level II or Level III payment will be awarded depending on whether the effects of a disability are of equivalent severity to the effects specified under Level II or Level III.

(3) Statements from private physicians, or government or private institutions. VA may accept statements from private physicians, or examination reports from government or private institutions, for purpose of rating spina bifida claims without further examination, provided the statements or reports are adequate for assessing the level of disability due to spina bifida under the provisions of paragraph (d)(1) of this section. In the absence of adequate medical information, VA will schedule an examination for purpose of assessing the level of disability.

(4) Medical evidence. VA will pay a person eligible for a monetary allowance due to spina bifida at Level I unless or until VA receives medical evidence supporting a higher payment. When required to reassess the level of disability under paragraph (d)(5) or (6) of this section, VA will pay a person eligible for this monetary allowance at Level I in the absence of evidence adequate to support a higher level of disability or if the person fails to report, without good cause, for a scheduled examination. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.

(5) Person under age of 1 year. VA will pay a person under the age of 1 year at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the person from ambulating, grasping a pen, feeding himself or herself, performing self care, or achieving urinary or fecal continence. If any of those deficits are present, VA will pay the person at Level III. In either case, VA will reassess the level of disability when the person reaches the age of 1 year.

(6) Reassessment of level of payment. VA will reassess the level of payment whenever VA receives medical evidence indicating that a change is warranted. For a person between the ages of 1 and 21, however, VA must reassess the level of payment at least every 5 years.

(e) Effective dates. See § 5.591.

(Authority: 38 U.S.C. 501(a), 1805, 1811, 1812, 1821, 1832–1834, 5101)

§ 5.590 Monetary allowance for a female Vietnam veteran's child with certain birth defects.

(a) Monthly monetary allowance—(1) General rule. VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for a person whose biological mother is or was a Vietnam veteran and who VA has determined to have a 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 person, as determined in accordance with the provisions of paragraph (e) of this section. 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 will, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18.

(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 a person in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military service of the person's mother during the Vietnam era and, in determining the level of disability for a person 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 a person whose only covered birth defect is spina bifida, a monetary allowance will be paid under § 5.589, not under this section, and the person will not be rated for disability under this section. In the case of a person 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 person would receive if his or her only covered birth defect were spina bifida. If, but for the person's one or more additional covered birth defects, the monetary allowance payable to or for the person would be based on a rating at Level I, II, or III under § 5.589(d), then the rating of the person'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. Except as provided in paragraph (a)(3) of this section, receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the person, or the right of any claimant or beneficiary, to receive any other benefit to which he or she may be entitled under any law administered by VA.

(c) Definitions—(1) Vietnam veteran. For purposes of this section, the term Vietnam veteran means a person who performed active military 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. For the definition of "service in the Republic of Vietnam," see § 5.262(a)(1).

(2) Person. For purposes of this section, the term person 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 § 5.181(b), VA will require the types of evidence specified in §§ 5.221 and 5.229 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) Covered birth defect. For 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 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 (d) are covered birth defects.

(1) Covered birth defects. Covered birth defects include, but are not limited to, the following conditions (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, but not limited to, 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) Familial disorders. Birth defects that are familial disorders, including, but not limited to, hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following conditions, 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) Congenital malignant neoplasms. Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Medulloblastoma;

(ii) Neuroblastoma;

(iii) Retinoblastoma;

(iv) Teratoma; and

(v) Wilm's tumor.

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

(i) Down syndrome and other Trisomies;

(ii) Fragile X syndrome;

(iii) Klinefelter's syndrome; and

(iv) Turner's syndrome.

(5) Birth-related injury. Conditions that are due to a birth-related injury are not covered birth defects. These include, but are not limited to, the following conditions:

(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) Fetal or neonatal infirmity. 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 conditions:

(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 1 year);

(ix) Prematurity; and

(x) Refractive disorders of the eye.

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

(i) Attention deficit disorder;

(ii) Autism;

(iii) Epilepsy diagnosed after infancy (after the age of 1 year);

(iv) Learning disorders; and

(v) Mental retardation (unless part of a syndrome that is a covered birth defect).

(8) Non-permanent physical or mental disabilities. Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to, the following conditions:

(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 ratings. Whenever VA determines, upon receipt of competent medical evidence, that a person has one or more covered birth defects, VA will also determine the level of disability currently resulting from the covered birth defects combined with any associated disabilities. No monetary allowance will be payable under this section if VA determines under this paragraph (e) that a person has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section apply. 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 person has no current disability resulting from covered birth defects.

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

(A) The person has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or

(B) The person has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

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

(A) The person has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the person 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 his or her age; or

(B) The person 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 including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

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

(A) The person has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the person is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The person is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The person's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for his or her age; or

(D) The person 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 including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

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

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

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

(C) The person 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 including, but not limited to, the nose, chin, forehead, eyes, 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, but not limited to, 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 a person has a covered birth defect and rating disability levels.—(1) Medical evidence. VA may accept statements from private physicians or examination reports from government or private institutions for purposes of determining whether a person 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 to determine whether a person has a covered birth defect or to assess the level of disability.

(2) Monthly monetary allowance for those with a covered birth defect. Except as paragraph (a)(3) of this section provides, VA will pay a monthly monetary allowance if VA is able to obtain medical evidence adequate to determine that a person 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 VA receives evidence indicating that a change is warranted.

(h) Referrals. If an agency of original jurisdiction 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 Service for determination.

(i) Effective dates. See § 5.591.

(Authority: 38 U.S.C. 501(a), 1811–1816, 1821, 1832–1834, 5101)

CROSS REFERENCE: § 5.1, for the definition of “competent evidence”.

§ 5.591 Effective date of award for a disabled child of a Vietnam veteran or a veteran with covered service in Korea.

This section provides the effective date of an award, reduction, or discontinuance of the monthly monetary allowance payable under § 5.589 to a Vietnam veteran or a veteran with covered service in Korea whose biological child is suffering from spina bifida or under § 5.590 to a female Vietnam veteran's biological child who suffers from one or more covered birth defects.

(a) Effective date of award. An award of a monetary allowance based on an original claim, a claim reopened after final denial, or a claim for increase will be effective the date VA received the claim or the date entitlement arose, whichever is later, subject to the following rules:

(1) An allowance payable under § 5.589 will not be effective before October 1, 1997;

(2) An allowance payable under § 5.590 will not be effective before December 1, 2001;

(3) Subject to paragraphs (a)(1) and (2) of this section, the effective date will be the child's date of birth, if VA received the claim no later than 1 year after the birth date;

(4) Subject to paragraphs (a)(1) and (2) of this section, if a previously denied claim is reopened and granted based on corrected military records, VA assigns an effective date in accordance with §§ 5.34(d) and 5.35(e); and

(5) Subject to paragraphs (a)(1) and (2) of this section, if a beneficiary is awarded an increase of a monetary allowance due to an increase in disability, VA will assign an effective date in accordance with § 5.312(b).

(b) Effective dates of reductions or discontinuances. Except as otherwise provided in this paragraph (b), the effective date of a reduction or discontinuance of a monetary allowance will be assigned in accordance with § 5.705(a).

(1) If the monetary allowance was paid erroneously because of beneficiary error, VA will assign an effective date in accordance with § 5.167(b).

(2) If the monetary allowance was paid erroneously because of administrative error by VA, VA will assign an effective date in accordance with § 5.167(c).

(3) If a discontinuance is due to the beneficiary's death, VA will discontinue benefits effective the first day of the month of the beneficiary's death.

(4) If a reduction or discontinuance is warranted by a change of law or VA issue, or by a change in interpretation of a law or VA issue, VA will assign an effective date in accordance with § 5.152(c).

(5) If a reduction or discontinuance is warranted by a change in the beneficiary's physical condition, VA will pay a reduced rate or discontinue the monetary allowance effective the first day of the month that begins after the end of the 60-day period

following the notice of the proposed reduction or discontinuance. The 60-day period is to be calculated in the same way as the notice period described in § 5.83(a).

(Authority: 38 U.S.C. 1805, 1832, 5110, 5112)

§ 5.592 Awards under Nehmer Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.

(a) Purpose. This section states effective-date rules required by orders of a U.S. district court in the class-action case of Nehmer v. U. S. Dep't of Veterans Affairs, 712 F. Supp. 1404 (N.D. Cal. 1989).

(b) Definitions. For purposes of this section:

(1) Nehmer class member means:

(i) A Vietnam veteran who has a covered herbicide disease; or

(ii) A surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

(2) Covered herbicide disease means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection pursuant to the Agent Orange Act of 1991, Public Law 102-4, other than chloracne. Those diseases are listed in § 5.262(e).

(c) Effective date of disability compensation. If a Nehmer class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award will be as follows:

(1) Disability compensation denied between September 25, 1985, and May 3, 1989. If VA denied disability compensation for the same covered herbicide disease in a decision issued between September 25, 1985, and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which the prior denial was based or the date the disability arose, except as provided in paragraph (c)(3) of this section. A prior decision will be construed as having denied disability compensation for the same disease if the prior decision denied disability compensation for a disease that reasonably may be construed as the same covered herbicide disease for which disability compensation has been awarded. Minor differences in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the prior decision denied disability compensation for the same covered herbicide disease.

(2) New or pending claim. If the class member's claim for disability compensation for the covered herbicide disease either was pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, the effective date of the award will be the later of the date such claim was received by VA or the date the disability arose, except as provided in paragraph (c)(3) of this section. A claim will be considered a claim for disability compensation for a particular covered herbicide disease if:

(i) The claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing disability compensation claims, as indicating an intent to apply for disability compensation for the covered herbicide disability; or

(ii) VA issued a decision on the claim, between May 3, 1989, and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, in which VA denied disability compensation for a disease that reasonably may be construed as the same covered herbicide disease for which disability compensation has been awarded.

(3) Claim received no later than 1 year after separation from service. If the class member's claim referred to in paragraph (c)(1) or (2) of this section was received no later than 1 year after the date of the class member's separation from service, the effective date of the award will be the day after the date of the class member's separation from active military service.

(4) Requirements not met. If the requirements of paragraph (c)(1) or (2) of this section are not met, the effective date of the award will be determined in accordance with § 5.152,,and with the appropriate effective date section of this part 5. See § 5.150(a) for the general rule of effective dates, and § 5.150(c) for a list of locations of other effective date provisions in part 5.

(d) Effective date of dependency and indemnity compensation. If a Nehmer class member is entitled to dependency and indemnity compensation (DIC) for a death due to a covered herbicide disease, the effective date of the award will be as follows:

(1) DIC denied between September 25, 1985, and May 3, 1989. If VA denied DIC for the death in a decision issued between September 25, 1985, and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which such prior denial was based or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section.

(2) New or pending claim. If the class member's claim for DIC for the death was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered herbicide disease that caused the death, the effective date of the award will be the later of the date such claim was received by VA or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section. In accordance with § 5.52(b)(2), a claim by a surviving spouse or child for death pension will be considered a claim for DIC. In all other cases, a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

(3) Claim received no later than 1 year after veteran’s death. If the class member's claim referred to in paragraph (d)(1) or (2) of this section was received no later than 1 year after the date of the veteran's death, the effective date of the award will be the first day of the month in which the death occurred.

(4) Requirements not met. If the requirements of paragraph (d)(1) or (2) of this section are not met, the effective date of the award will be determined in accordance with § 5.152.

(e) Effect of other provisions affecting retroactive entitlement—(1) Scope. If the requirements specified in paragraphs (c)(1), (c)(2), (d)(1), or (d)(2) of this section are satisfied, the effective date will be assigned as specified in those paragraphs, without regard to the provisions in 38 U.S.C. 5110(g) or § 5.152 prohibiting payment for periods prior to the effective date of the statute or regulation establishing a presumption of service connection for a covered herbicide disease. However, the provisions of this section will not apply if payment to a Nehmer class member based on a claim described in paragraph (c) or (d) of this section is otherwise prohibited by statute or regulation, as, for example, where a class member did not qualify as a surviving spouse at the time of the prior claim or denial.

(2) Claims based on service in the Republic of Vietnam prior to August 5, 1964. If a claim referred to in paragraph (c) or (d) of this section was denied by VA prior to January 1, 1997, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective-date rules of this regulation do not apply. The effective date of benefits in such cases will be determined in accordance with 38 U.S.C. 5110. If a claim referred to in paragraph (c) or (d) of this section was pending before VA on January 1, 1997, or was received by VA after that date, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective date will be the later of the date provided by paragraph (c) or (d) of this section or January 1, 1997.

(Authority: Sec. 505, Pub. L. 104–275, 110 Stat. 3342-43)

(f) Payment of benefits to the survivor or estate of the deceased beneficiary—(1) General rule. If a Nehmer class member entitled to retroactive benefits pursuant to paragraphs (c)(1) through (3) or (d)(1) through (3) of this section dies prior to receiving payment of any such benefits, VA will pay such unpaid retroactive benefits to the first person or entity listed below that is in existence at the time of payment:

(i) The class member's spouse, regardless of current marital status.

NOTE TO PARAGRAPH (f)(1)(i): For purposes of this paragraph (f), a “spouse” is the person who was legally married to the class member at the time of the class member's death.

(ii) The class member's child, regardless of age or marital status (if more than one child exists, payment will be made in equal shares, accompanied by an explanation of the division).

NOTE TO PARAGRAPH (f)(1)(ii): For purposes of this paragraph (f), the term “child” includes a natural and an adopted child, and also includes any stepchild who was a member of the class member's household at the time of the class member's death.

(iii) The class member's parent, regardless of dependency (if both parents are alive, payment will be made in equal shares, accompanied by an explanation of the division).

NOTE TO PARAGRAPH (f)(1)(iii): For purposes of this paragraph (f), the term “parent” includes a natural and an adoptive parent, but in the event of successive parents, the persons who last stood as parents in relation to the class member will be considered the parents.

(iv) The class member's estate.

(2) Inapplicability of certain accrued benefit requirements. The provisions of 38 U.S.C. 5121(c) and § 5.552(a), requiring a survivor to file a claim for accrued benefits do not apply to payments under this section. When a Nehmer class member dies prior to receiving retroactive payments under this section, VA will pay the amount to an identified payee in accordance with paragraph (f)(1) of this section without requiring an application from the payee. Prior to releasing such payment, however, VA may ask the payee to provide further information as specified in paragraph (f)(3) of this section.

(3) Identifying a payee. VA will make reasonable efforts to identify the appropriate payee under paragraph (f)(1) of this section based on information in the veteran's claims file. If further information is needed to determine whether any appropriate payee exists or whether there is a person having equal or higher priority than a known prospective payee, VA will request such information from a survivor or authorized representative if the claims file provides sufficient contact information. Before releasing payment to an identified payee, VA will ask the payee to state whether there is any other survivor of the class member who may have equal or greater entitlement to payment under this section, unless the circumstances clearly indicate that such a request is unnecessary. If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other person, unless VA is able to recover the payment previously released.

(4) Bar to accrued benefit claims. Payment of benefits pursuant to paragraph (f)(1) of this section will bar a later claim by any person for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and § 5.551(a).

(g) Awards covered by this section. This section applies only to awards of disability compensation or DIC for disability or death caused by a disease listed in paragraph (b)(2) of this section.

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

§§ 5.593–5.599 [Reserved]

ANCILLARY BENEFITS FOR CERTAIN SERVICE-CONNECTED VETERANS AND CERTAIN MEMBERS OF THE ARMED FORCES SERVING ON ACTIVE DUTY

§§ 5.600–5.602 [Reserved]

§ 5.603 Financial assistance to purchase a vehicle or adaptive equipment.

(a) Eligibility. Certain persons with qualifying disabilities will be certified as eligible for financial assistance to purchase a vehicle and necessary adaptive equipment.

(b) Definition of terms. The following definitions apply to this section:

(1) Adaptive equipment. (i) Adaptive equipment means equipment that must be part of or added to a vehicle manufactured for sale to the general public to:

(A) Make it safe for use by the eligible person; and

(B) Assist the eligible person in meeting applicable standards of licensure by the proper licensing authority.

(ii) Adaptive equipment includes, but is not limited to:

(A) Automatic transmission;

(B) Power steering, power brakes, power window lifts, and power seats;

(C) Modification of the interior space if necessary for the eligible person to enter or travel in the vehicle; and

(D) Special equipment that the Under Secretary for Health or designee has deemed to be ordinarily necessary to assist an eligible person into or out of a vehicle, even if another person operates the vehicle for the eligible person, or for an eligible person to operate the vehicle.

(2) Vehicle. Vehicle means an automobile, van, truck, jeep, tractor, golf cart, or other conveyance.

(c) Eligibility criteria—(1) Persons eligible. The claimant must be:

(i) A veteran who is entitled to disability compensation under 38 U.S.C. chapter 11, including disability compensation under 38 U.S.C. 1151, for a qualifying disability described in paragraph (c)(2) of this section; or

(ii) A member of the Armed Forces serving on active duty who has a qualifying disability described in paragraph (c)(2) of this section that is the result of an injury incurred or disease contracted in or aggravated by active military service.

(2) Qualifying disabilities. The claimant must have one of the following disabilities:

(i) Anatomical loss or permanent loss of use of one or both feet;

(ii) Anatomical 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 degrees in the better eye;

(iv) Ankylosis of one or both knees or of one or both hips; however, VA will provide to a person with ankylosis only financial assistance to purchase adaptive equipment, and will not provide financial assistance to purchase a vehicle; or

(v) Severe burn injury.

(d) Limitations on assistance—(1) Claim for financial assistance to purchase a vehicle or adaptive equipment. (i) The claimant must file a claim for financial assistance to purchase a vehicle or adaptive equipment, which includes a certification by the claimant that the vehicle will be operated only by a person properly licensed. However, VA will provide financial assistance to purchase a vehicle for an eligible person who cannot qualify to operate a vehicle if another person is to operate the vehicle for the eligible person.

(ii) A claim for financial assistance to purchase a vehicle will also be considered a claim for adaptive equipment necessary to operate the vehicle according to the safety standards of the licensing authority.

(iii) There is no time limit in which the claimant must apply for benefits under this section.

(iv) For a claimant applying while still on active duty, the claim will be deemed filed with VA on the date the application is shown to be in possession of military authorities for transmittal to VA.

(2) Financial assistance for vehicles. An eligible person is not entitled to benefits for the purchase of more than one vehicle under the provisions of this section. No payments may be made for the repair, maintenance, or replacement of the vehicle.

(3) Financial assistance for adaptive equipment. An eligible person is not entitled to adaptive equipment for more than two vehicles in a 4-year period unless, due to circumstances beyond the eligible person's control, one of the adapted vehicles is no longer available. The Under Secretary for Health or designee may authorize payments or reimbursements for the repair, replacement, or reinstallation of adaptive equipment deemed necessary for the operation of the vehicle. See § 17.158 of this chapter for additional limitations on assistance for adaptive equipment.

(e) VA certification process for financial assistance to purchase a vehicle or adaptive equipment. If a claim for financial assistance to purchase a vehicle or adaptive equipment is granted, VA will issue a certificate of eligibility to the claimant.

(f) Redemption of certificate of eligibility—(1) Purchase of vehicle. VA may pay the financial assistance to purchase a vehicle to the seller as follows:

The eligible person must give the certificate of eligibility to the seller of the vehicle. The seller must send the purchase receipt and certificate of eligibility to a VA

regional office for reimbursement of the purchase price, or the statutory limit set in 38 U.S.C. 3902(a), whichever is less.

(2) Purchase of adaptive equipment. VA may pay the adaptive equipment allowance to either the seller or the eligible person as follows:

(i) Seller. The eligible person must give the certificate of eligibility to the seller of the adaptive equipment. The seller must send the purchase receipt and certificate of eligibility to a VA regional office for reimbursement of the actual cost of the adaptive equipment.

(ii) Eligible person. The eligible person must send the purchase receipt and certificate of eligibility to VA for reimbursement of the actual cost of the adaptive equipment.

(Authority: 38 U.S.C. 3901, 3902, 3903)

§ 5.604 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) or 2101A(a) may be extended to a veteran or a member of the Armed Forces serving on active duty if the following requirements are met:

(a) Eligibility. A veteran must have had active military service after April 20, 1898. Benefits are not restricted to veterans with wartime service. After December 15, 2003, the benefit under this section is also available to a person in the Armed Forces serving on active duty.

(b) Disability. A person in the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in the line of duty in active military service. A veteran must be entitled to compensation under 38 U.S.C. chapter 11 for a disability rated as permanent and total. In either case, the disability must be due to:

(1) The anatomical loss or loss of use of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity;

(3) The anatomical loss or loss of use of one lower extremity together with residuals of organic injury or disease 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 anatomical loss or loss of use of one lower extremity together with the anatomical loss or loss of use of 1 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;

(5) The anatomical loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow; or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

(c) Preclude locomotion. Preclude locomotion 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. 1151(c)(1), 2101, 2101A, 2102, 2104)

CROSS REFERENCE: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

§ 5.605 Special home adaptation grants under 38 U.S.C. 2101(b).

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, after October 27, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 2101(b) or 2101A(a) may be issued to a veteran who served after April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section after December 15, 2003, if the following requirements are met:

(a)(1) The veteran or member of the Armed Forces serving on active duty is not entitled to a certificate of eligibility for assistance in acquiring specially adapted housing under § 5.604, nor had the veteran or member of the Armed Forces serving on active

duty previously received assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a).

(2) A veteran or member of the Armed Forces serving on active duty who first establishes entitlement under this section and who later becomes eligible for a certificate of eligibility under § 5.604 may be issued a certificate of eligibility under § 5.604.

(b) A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in the line of duty in active military service. A veteran must be entitled to compensation under 38 U.S.C. chapter 11 for a disability rated as permanent and total. In either case, the disability must:

(1) Include the anatomical loss or loss of use of both hands; or

(2) Be due to:

(i) Blindness in both eyes with 5/200 visual acuity or less; or

(ii) Deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk; or

(iii) Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk; or

(iv) Residuals of an inhalation injury, including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease.

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2102, 2104)

CROSS REFERENCE: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

§ 5.606 Clothing allowance.

(a) General rule. VA will pay an annual clothing allowance to a veteran with a qualifying disability. However, VA will pay more than one annual clothing allowance if VA determines that the veteran has more than one qualifying disability. For purposes of this section, a "veteran" includes a person who has returned to active duty after previously meeting the definition of "veteran" found in § 5.1.

(b) Qualifying disability. A "qualifying disability" is a service-connected disability, or a disability compensable "as if" service connected under 38 U.S.C. 1151, that:

(1) Is the anatomical loss or loss of use of a hand or foot compensable at a rate specified in §§ 5.322 through 5.329, § 5.331, or § 5.332 that requires the veteran to wear or use a prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) that tends to wear or tear the veteran's clothing, which is shown on VA examination, or by a hospital or examination report from a facility specified in § 5.91(a);

(2) The Under Secretary for Health or designee certifies that the veteran wears or uses a prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) that tends to wear or tear the veteran's clothing; or

(3) Is a skin condition that the Under Secretary for Health or designee certifies requires the veteran to use prescription medication that causes irreparable damage to the veteran's outer garments.

(c) New claim required every year. The veteran must file a claim for a clothing allowance every year, unless:

(1) The clothing allowance was granted according to the criteria in paragraph (b)(1) of this section; or

(2) The Under Secretary for Health or designee finds that a clothing allowance granted according to the criteria in paragraph (b)(2) or (3) of this section is static.

(d) Payment year. Clothing allowance is paid annually. The payment year covers a 12-month period beginning August 1 and ending July 31 of the following year. The initial year of payment eligibility begins August 1 of the calendar year in which VA notifies the veteran of his or her entitlement to service connection for a qualifying disability.

(e) Time limits for claim.—(1) Initial year of payment eligibility. A veteran who meets the requirements of paragraphs (b)(1) through (3) of this section is eligible to receive the annual clothing allowance for the initial year of payment eligibility if:

(i) VA notifies the veteran of his or her entitlement to service connection for a qualifying disability before August 1 of the initial year of payment eligibility, and the veteran files a claim for clothing allowance no later than 1 year after August 1 of the initial year of payment eligibility; or

(ii) VA notifies the veteran of his or her entitlement to service connection for a qualifying disability after August 1 of the initial year of payment eligibility, and the veteran files a claim for clothing allowance no later than 1 year after the date of the notice.

(2) Payment year following date of claim. VA will pay the clothing allowance for the payment year that begins after the date of the claim for clothing allowance, if the veteran is entitled to the clothing allowance, and if:

(i) VA notified the veteran of his or her entitlement to service connection for a qualifying disability before August 1 of the initial year of payment eligibility, and the veteran filed the claim for clothing allowance more than 1 year after August 1 of the initial year of payment eligibility; or

(ii) VA notified the veteran of his or her entitlement to service connection for a qualifying disability after August 1 of the initial year of payment eligibility, and the veteran filed the claim for clothing allowance more than 1 year after the date of the notice.

(f) Reduction for incarceration. An eligible veteran who is incarcerated for any reason for more than 60 days in a Federal, State, or local penal institution and who is provided clothing without charge by the institution will not receive the full clothing

allowance payment. VA will reduce the amount stated in 38 U.S.C. 1162 by 1/365th of that amount for each day over 60 days that the veteran was incarcerated during the 12-month period beginning August 1 and ending July 31. VA will not reduce the amount for the initial 60 days of a period of incarceration.

(Authority: 38 U.S.C. 107, 1162, 5313A)

CROSS REFERENCE: § 5.1, for the definition of "State".

§§ 5.607–5.609 [Reserved]

Subpart I—Benefits for Certain Filipino Veterans and Survivors

PHILIPPINE SERVICE

§ 5.610 Eligibility for benefits based on Philippine service.

(a) Old Philippine Scouts—(1) Included service. Service in the Old Philippine Scouts (Scouts who enlisted before October 6, 1945) constitutes active military service for purposes of pension, disability compensation, dependency and indemnity compensation (DIC), and burial benefits. Service as an officer commissioned in connection with the administration of Pub. L. 79-190, 59 Stat. 538, also constitutes active military service under this paragraph (a)(1).

(2) Rate of payment. Benefits are payable at the full-dollar rate.

(3) Acceptable evidence of service in the Old Philippine Scouts. Service must be established as specified in § 5.40.

(b) New Philippine Scouts—(1) Included service. All enlistments and reenlistments of New Philippine Scouts in the Regular Army between October 6, 1945, and June 30, 1947, inclusive, constitute active military service for purposes of disability compensation and DIC, and, in the case of deaths occurring after December 15, 2003, burial benefits.

(2) Rate of payment. Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (b)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) Acceptable evidence of service in the New Philippine Scouts. Service must be established as specified in § 5.40.

(c) Commonwealth Army of the Philippines—(1) Included service. Service of a member of the Commonwealth Army of the Philippines constitutes active military service for purposes of disability compensation, DIC, and burial allowance, from and after the dates and hours, respectively, when he or she was called into service of the Armed Forces of the U.S. by orders issued from time to time by the Commander-in-Chief, Southwest Pacific Area, or other competent authority in the Army of the U.S., pursuant to the Military Order of the President of the U.S. dated July 26, 1941.

(2) Rate of payment. Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (c)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) Presumption of soundness. Unless the record shows examination at the time of entrance into the Armed Forces of the U.S., such a person is not entitled to the presumption of soundness. This also applies upon reentering the Armed Forces after a period of inactive military service.

(4) Acceptable evidence of service in the Commonwealth Army of the Philippines. Service must be established as specified in § 5.40.

(d) Guerrilla service—(1) Included service. A person who served as a guerrilla under a commissioned officer of the U.S. Army, Navy, or Marine Corps, or under a commissioned officer of the Commonwealth Army of the Philippines recognized by and cooperating with the U.S. Forces is considered to have performed active military service for purposes of disability compensation, DIC, and burial allowance. Service as a guerrilla by a member of the Old Philippine Scouts or the Armed Forces of the U.S. is considered service in his or her regular status. (See paragraph (a) of this section.)

(2) Rate of payment. Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (d)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) Acceptable evidence of guerrilla service. Service must be established as specified in § 5.40. The following certifications by a U.S. service department in accordance with § 5.40 will be accepted as establishing guerrilla service:

(i) Recognized guerrilla service; or

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

(4) Unacceptable evidence of guerrilla service. A certification of anti-Japanese activity will not be accepted as establishing guerrilla service.

(e) Combined service. Where a veteran who had Commonwealth Army of the Philippines or guerrilla service and also had other service, wartime or peacetime, in the Armed Forces of the U.S., has disabilities that 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 rating for which dollars are payable will be first considered and the difference between this rating and the combined rating will be the basis for computing the amount payable at the rate of $0.50 for each dollar authorized.

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

CROSS REFERENCE: § 5.21, Service VA recognizes as active military service. § 5.28, Other groups designated as having performed active military service. § 5.39, Minimum active duty service requirement for VA benefits. § 5.40, Service records as evidence of service and character of discharge that qualify for VA benefits.

§ 5.611 Philippine service: determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.

(a) Period of service. For an Old Philippine Scout, a member of one of the regular components of the Commonwealth Army of the Philippines while serving with the Armed Forces of the U.S., and a New Philippine Scout, the period of active military service will be from the date certified by the U.S. Armed Forces as the date of enlistment or the date of reporting for active duty, whichever is later, to the date of release from active duty, discharge, death, or in the case of a member of the Commonwealth Army of the Philippines, June 30, 1946, whichever is 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 if factually shown that at that time he or she was with his or her unit or if death is presumed to have occurred while carried in such status. However, if there is credible evidence that he or she was alive after commencement of his or her missing-in-action status, then the presumption of death will not apply for VA purposes.

(5) Capitulation on May 6, 1942, except that periods of recognized guerrilla service, unrecognized guerrilla service under a recognized commissioned officer, or periods of service in units which continued organized resistance against the Japanese

prior to formal capitulation will be considered return to active duty for the period of such service.

(b) Prisoner of war status. Active military service of an Old Philippine Scout or a member of the Commonwealth Army of the Philippines serving with the Armed Forces of the U.S. 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 VA to have been injured or killed by the Japanese because of anti-Japanese activities or because of his or her former service in the Armed Forces of the U.S., such injury or death may be held to have been incurred in active military service for VA purposes. VA will make such determinations based on all available evidence, including, but not limited to U.S. service department reports, and VA will consider the character and length of the veteran's former active military service in the Armed Forces of the U.S.

(c) Arrest. 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) Period of guerrilla service. The active military service of a guerrilla will be the period certified by a U.S. service department.

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

CROSS REFERENCE: § 5.40, Service records as evidence of service and character of discharge that qualify for VA benefits. § 5.140, Determining former prisoner of war status, for the definition of "former prisoner of war".

BENEFITS AND EFFECTIVE DATES OF CERTAIN FILIPINO VETERANS AND SURVIVORS

§ 5.612 Overview of benefits available to a Filipino veteran and his or her survivor.

(a) Scope. The following table lists many of the benefits that VA may provide based on qualifying service in the Republic of the Philippines. This table does not confer any substantive rights.

Benefits Available to a Filipino Veteran and His or Her Survivor

Benefit	Armed Forces of the U.S., including Old Philippine Scouts (§ 5.610(a))	New Philippine Scouts (§ 5.610(b))	Commonwealth Army of the Philippines/Guerrillas (§ 5.610(c) and (d))

Benefit	Armed Forces of the U.S., including Old Philippine Scouts (§ 5.610(a))	New Philippine Scouts (§ 5.610(b))	Commonwealth Army of the Philippines/Guerrillas (§ 5.610(c) and (d))
(1) Disability Compensation	Yes – Full-Rate.	Yes – Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.	Yes – Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.
(2) Pension	Yes – Full-Rate.	No.	No.
(3) Clothing Allowance	Yes – Full-Rate.	Yes – Half-Rate.	Yes – Half-Rate.
(4) DIC	Yes – Full-Rate.	Yes – Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.	Yes – Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.
(5) Parents' DIC	Yes – Full-Rate.	Yes – Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise,	Yes - Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.

Benefit	Armed Forces of the U.S., including Old Philippine Scouts (§ 5.610(a))	New Philippine Scouts (§ 5.610(b))	Commonwealth Army of the Philippines/Guerrillas (§ 5.610(c) and (d))
		Half-Rate.	
(6) Burial Benefits	Yes – Full-Rate.	Yes – Full-Rate if veteran dies after 12/15/03 and was a U.S. citizen or permanent resident alien and residing in U.S. on date of death (in some cases). See § 5.617 for specific requirements. Half-Rate if veteran dies after 12/15/03, but above criteria not met. No benefits payable if veteran died before 12/16/03.	Yes – Full-Rate if veteran dies after 11/1/00 and was a U.S. citizen or permanent resident alien and residing in U.S. on date of death (in some cases). See § 5.617 for specific requirements. Half-Rate if veteran dies after 11/1/00 but above criteria not met or if veteran died before 11/2/00.

(b) Other sections relevant to claims based on qualifying service in the Republic of the Philippines—(1) Affidavits prepared in the Republic of the Philippines. See § 5.132.

(2) Child adopted under foreign law. See § 5.225.

(3) Dependents' educational assistance for a child based on the child's parent's service in the Commonwealth Army of the Philippines or as a New Philippine Scout as defined in § 5.610(b), (c), or (d). See § 5.586.

(4) Forfeiture based on fraud or treason committed in the Philippine Islands. See §§ 5.676 and 5.677.

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

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.613 Payment of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S.

(a) Definitions. For purposes of this section:

(1) United States means the States, territories, and possessions of the United U.S.; the District of Columbia; and the Commonwealth of Puerto Rico.

(2) Residing in the U.S. means that a person's principal, actual residence is in the U.S. and that the person meets the residency requirements of paragraph (c)(1) of this section.

(3) Citizen of the U.S. means any person who acquires U.S. citizenship through birth in the territorial U.S., birth abroad as provided under title 8, United States Code, or through naturalization, and has not renounced his or her U.S. citizenship, or had such citizenship cancelled, revoked, or otherwise discontinued.

(4) Lawfully admitted for permanent residence means that a person has been, and continues to be, lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code.

(b) Eligibility requirements. Disability compensation or dependency and indemnity compensation (DIC) is payable at the full-dollar rate based on service described in § 5.610(b), (c), or (d) to a veteran or a veteran's survivor who is residing in the U.S. and is either:

(1) A citizen of the U.S.; or

(2) An alien lawfully admitted for permanent residence in the U.S.

(c) Evidence of eligibility for full-dollar rate benefits—(1) Evidence of residency. (i) Evidence establishing that the veteran or the veteran's survivor is residing in the U.S. should identify the veteran's or veteran's survivor's name and relevant dates, and may include:

(A) A valid driver's license issued by the State of residence;

(B) Employment records, which may consist of pay stubs, W-2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization, and showing the name of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's or veteran's survivor's name does not constitute evidence showing that the veteran or veteran's survivor is lawfully residing in the U.S.

(2) Evidence of citizenship. A valid original or valid copy of one of the following documents is required to prove that the veteran or the veteran's survivor is a natural born citizen of the U.S.:

(i) A U.S. passport;

(ii) A birth certificate showing that he or she was born in the U.S.; or

(iii) A Report of Birth Abroad of a Citizen of the U.S. issued by a U.S. consulate.

(3) Verification of citizenship. Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is a naturalized citizen of the U.S., or a valid U.S. passport, will be sufficient proof of such status.

(4) Verification of permanent resident status. Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is an alien lawfully admitted for permanent residence in the U.S. will be sufficient proof of such status.

(d) Continued eligibility.—(1) Present in the U.S. In order to continue receiving benefits at the full-dollar rate under this section, a veteran or a veteran's survivor must be physically present in the U.S. for at least 183 days of each calendar year in which he or she receives payments at the full-dollar rate, and may not be absent from the U.S. for more than 60 consecutive days at a time, unless good cause is shown. When a veteran's or veteran's survivor's absence from the U.S. exceeds one of those limits, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the date determined under § 5.618. If such veteran or veteran's survivor returns to the U.S., VA will resume payments at the full-dollar rate, effective on the date determined under § 5.614. However, if a veteran or a veteran's survivor becomes eligible for full-dollar rate benefits for the first time after June 30 of any calendar year, the 183-day rule will not apply during that calendar year. VA will not consider a veteran or a veteran's survivor to have been absent from the U.S. if he or she left and returned to the U.S. on the same date.

(2) Veteran or veteran's survivor leaves U.S. or loses citizenship or status. A veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must inform VA no later than 30 days after leaving the U.S., or no later than 30 days after losing either his or her U.S. citizenship or lawful permanent resident alien status. When a veteran or a veteran's survivor no longer meets the eligibility requirements of paragraph (b) of this section, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the date determined under § 5.618. If such veteran or veteran's survivor regains his or her U.S. citizenship or lawful permanent

resident alien status, VA will restore full-dollar rate benefits, effective on the date determined under § 5.614.

(3) Verification of status. When requested to do so by VA, a veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must verify that he or she continues to meet the residency and citizenship or permanent resident alien status requirements of paragraph (b) of this section. VA will advise the veteran or the veteran's survivor at the time of the request that the verification must be received no later than 60 days after the date of the request or else the rate of payment will be reduced. If VA does not receive the evidence within 60 days after the date of the request, VA will pay a reduced rate of $0.50 for each dollar authorized, effective on the date provided in § 5.104, Certifying continuing eligibility to receive benefits. If VA subsequently receives the requested evidence of continued eligibility, it will resume payments at the full-dollar rate, effective on the date determined under § 5.614.

(4) Change of address. A veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must promptly inform VA of any change in his or her address. If mail from VA to the veteran or the veteran's survivor is returned to VA by the U.S. Postal Service, VA will make reasonable efforts to determine the correct mailing address. If VA is unable to determine the correct mailing address through reasonable efforts, VA will pay a reduced rate of $0.50 for each dollar authorized under law, effective on the date determined under § 5.618. If VA subsequently receives evidence of a valid U.S. mailing address, it will resume payments at the full-dollar rate, effective on the date determined under § 5.614.

(Authority: 38 U.S.C. 107, 501(a))

CROSS REFERENCE: § 5.1, for the definitions of “alien” “State”.

§ 5.614 Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor.

Public Laws 106-377 and 108-183, which provide disability compensation and dependency and indemnity compensation (DIC) at full-dollar rates to certain Filipino veterans and their survivors, are considered liberalizing laws. Accordingly, the provisions of § 5.152, apply when determining the effective date of an award. If the requirements of § 5.152 are not satisfied, then the effective date of an award or increased award of benefits at the full-dollar rate under § 5.613 will be determined as follows:

(a) Effective date of initial entitlement to the full-dollar rate. The latest of the following dates:

(1) Date entitlement arose;

(2) Date on which the veteran or the veteran’s survivor first met the residency and citizenship or permanent resident alien status requirements in § 5.613, if VA receives evidence of this no later than 1 year after that date; or

(3) Effective date of service connection, provided that no later than 1 year after VA notifies the veteran or the veteran’s survivor that it has granted service connection,

VA receives evidence that he or she meets the residency and citizenship or permanent resident alien status requirements in § 5.613.

(b) Effective date of resumption of the full-dollar rate. Depending on the reason for reduction to the rate of $0.50 for each dollar, the effective date of restored eligibility for the full-dollar rate will be:

(1) The date the beneficiary regains his or her U.S. citizenship or lawful permanent resident alien status as required in § 5.613;

(2) The date the veteran or the veteran's survivor returned to the U.S. after an absence of more than 60 consecutive days;

(3) In the case of a veteran or veteran's survivor who was absent from the U.S. for a total of 183 days or more and returned to the U.S. during the same calendar year, the first day of the following calendar year; or

(4) In the case of a veteran or veteran's survivor who was absent from the U.S. for a total of 183 days or more and returned to the U.S. in a later calendar year but less than 183 days after the beginning of such calendar year, the day following their return.

(5) In the case of resumption of the full-dollar rate under § 5.613(d)(3), the date the requested evidence of continued eligibility is received by VA; or

(6) In the case of resumption of the full-dollar rate under § 5.613(d)(4), the date VA receives evidence of a valid U.S. mailing address.

(c) When payments at the full-dollar rate will begin after eligibility is restored. In the case of a veteran or a veteran's survivor whose eligibility is restored under § 5.613,

Payment of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S., VA will resume payments at the full-dollar rate, if otherwise in order, effective the first day of the month after the date established in paragraph (b) of this section. However, such increased payments will not be retroactive for more than 1 year before the date on which VA receives evidence that the veteran or veteran's survivor met the requirements again.

(Authority: 38 U.S.C. 107; Pub. L. 106-377 App. A, 114 Stat. 1441A-57; Pub. L. 108-183, 117 Stat. 2651)

CROSS REFERENCE: § 5.1, for the definition of "alien".

§ 5.615 Parents' dependency and indemnity compensation based on certain Philippine service.

(a) Scope. This regulation applies to claims for parents' dependency and indemnity compensation (DIC) based on the following types of service, as described in § 5.610:

(1) Service in the Commonwealth Army of the Philippines;

(2) Service as a guerrilla; and

(3) Service as a New Philippine Scout.

(b) Income limitations. DIC is not payable to a parent whose annual income exceeds the limitations set forth in 38 U.S.C. 1315 (b), (c), or (d). For parents' DIC, these income limitations will be at a rate of $0.50 for each dollar. However, if the beneficiary meets the requirements for the full-dollar rate in § 5.613, then these income limitations will be at the full-dollar rate.

(Authority: 38 U.S.C. 107; Pub. L. 108-183, 117 Stat. 2651)

CROSS REFERENCE: §§ 5.530 through 5.537, for eligibility requirements and payment rules for parents' DIC.

§ 5.616 Hospitalization in the Philippines.

Hospitalization in the Philippines under 38 U.S.C. 1731, 1732, and 1733 does not qualify the deceased for burial benefits based on death while properly hospitalized by VA.

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

CROSS REFERENCE: §§ 5.630 through 5.653, for burial benefits.

§ 5.617 Burial benefits at the full-dollar rate for certain Filipino veterans residing in the U.S. on the date of death.

(a) Definitions. For purposes of this section:

(1) United States means the States, territories, and possessions of the U.S.; the District of Columbia; and the Commonwealth of Puerto Rico.

(2) Residing in the U.S. means a person's principal, actual residence was in the U.S. When death occurs outside the U.S., VA will consider the deceased person to have been residing in the U.S. on the date of death if the person maintained his or her principal, actual residence in the U.S. until his or her most recent departure from the U.S., and he or she had been physically absent from the U.S. less than 61 consecutive days when he or she died.

(3) Citizen of the U.S. means any person who acquires U.S. citizenship through birth in the territorial U.S., birth abroad as provided under title 8, United States Code, or through naturalization, and has not renounced his or her U.S. citizenship, or had such citizenship cancelled, revoked, or otherwise discontinued.

(4) Lawfully admitted for permanent residence means that the person had been, and continued to be, lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code, on the date of death.

(b) Eligibility requirements. VA will pay burial benefits under 38 U.S.C. chapter 23, at the full-dollar rate, based on service described in § 5.610(c) or (d) when a person who performed such service dies after November 1, 2000, or based on service described in § 5.610(b) when a person who performed such service dies after December 15, 2003, and was on the date of death:

(1) Residing in the U.S.; and was

(2) Either:

(i) A citizen of the U.S.; or

(ii) An alien lawfully admitted for permanent residence in the U.S.; and was

(3) Either:

(i) Receiving disability compensation under 38 U.S.C. chapter 11; or

(ii) Meeting the disability, income, and net worth requirements of § 5.371,and would have been eligible for pension if the veteran's service had been deemed to be active military service.

(c) Evidence of eligibility—(1) Evidence of residency. (i) Evidence establishing that the veteran was residing in the U.S. on the date of death should identify the veteran’s name and relevant dates, and may include:

(A) A valid driver's license issued by the State of residence;

(B) Employment records, which may consist of pay stubs, W-2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization of the veteran or the veteran’s survivor, and showing the name of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's name does not constitute evidence showing that the veteran was lawfully residing in the U.S. on the date of death.

(2) Evidence of citizenship. In a claim for full-dollar rate burial payments based on the deceased veteran having been a natural born citizen of the U.S., a valid original or valid copy of one of the following documents is required:

(i) A U.S. passport;

(ii) A birth certificate showing that he or she was born in the U.S.; or

(iii) A Report of Birth Abroad of a Citizen of the U.S. issued by a U.S. consulate.

(3) Verification of citizenship. In a claim for full-dollar rate burial payments based on the deceased veteran having been a naturalized citizen of the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA, or a valid U.S. passport, will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(4) Verification of permanent resident status. In a claim for full-dollar rate burial payments based on the deceased veteran having been an alien lawfully admitted for permanent residence in the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(Authority: 38 U.S.C. 107, 501(a))

CROSS REFERENCE: § 5.1, for the definitions of "alien" and "State".

§ 5.618 Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor.

(a) General rule. VA will assign an effective date of a reduction or discontinuance of benefits payable to a Filipino veteran or the veteran's survivor in accordance with § 5.705.

(b) Discontinuance based on the withdrawal of recognition of service. When a discontinuance is based on the withdrawal of recognition of service, the discontinuance will be effective the first day of the month after the month for which VA last paid benefits.

(c) Reduction of payments from the full-dollar rate to the half-dollar rate. The effective date of discontinuance of the full-dollar rate of payment under § 5.613, and reduction to the $0.50 rate of payment will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be effective the day after the date of discontinuance of the greater benefit.

(1) Absence from U.S. for 183 days or more. If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is physically absent from the U.S. for a total of 183 days or more during any calendar year, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the 183rd day of absence from the U.S.

(2) Absence from U.S. for more than 60 consecutive days. If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is physically

absent from the U.S. for more than 60 consecutive days, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the 61st day of the absence.

(3) Loss of U.S. citizenship or status. If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 loses either U.S. citizenship or status as an alien lawfully admitted for permanent residence in the U.S., VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the day he or she no longer satisfies one of these criteria.

(4) Verification of status. In the case of a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613, if VA requests evidence of verification of continued eligibility under § 5.613, but does not receive such evidence within 60 days after such request, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective as provided in § 5.104.

(5) Change of address. If mail to a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is returned to VA by the U.S. Postal Service, VA will make reasonable efforts to determine the correct mailing address. If VA is unable to determine the veteran's or the veteran's survivor's correct address through reasonable efforts, VA will pay a reduced rate of $0.50 for each dollar authorized under law, effective the first day of the month after the month for which VA last paid benefits.

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

CROSS REFERENCE: § 5.1, for the definition of "alien". § 5.705, General effective dates of reduction or discontinuance of benefits.

§§ 5.619–5.629 [Reserved]

Subpart J—Burial Benefits

BURIAL BENEFITS: GENERAL

§ 5.630 Types of VA burial benefits.

(a) Burial benefits. VA provides the following types of burial benefits, which are discussed in §§ 5.631 through 5.653:

(1) Burial allowance based on service-connected death;

(2) Burial allowance based on nonservice-connected death;

(3) Burial allowance for a veteran who died while hospitalized by VA;

(4) Burial plot or interment allowance; and

(5) Allowance for transportation of remains.

(b) Definition. For purposes of this subpart, burial means all the legal methods of disposing of the remains of a deceased person, including, but not limited to, cremation, burial at sea, and medical school donation.

(c) Cross references. (1) Other benefits and services related to the memorialization or interment of a deceased veteran include the following:

(A) Burial in a national cemetery (see §§ 38.600 through 38.629 of this chapter);

(B) Presidential memorial certificates (see 38 U.S.C. 112);

(C) Burial flags (see § 1.10 of this chapter); and

(D) Headstones or markers (see §§ 38.630 through 38.633 of this chapter).

(2) The provisions of §§ 5.631 through 5.653 do not apply to any of the programs listed in paragraph (c)(1) of this section.

§ 5.631 Deceased veterans for whom VA may provide burial benefits.

For purposes of providing burial benefits under subpart J of this part, a "veteran" is a person who:

(a) Had active military service and who was discharged or released under conditions other than dishonorable;

(b) Died during authorized travel to or from a period of active duty under § 5.29(a)(1); or

(c) Is entitled to a burial benefit based on a specific provision of law.

(Authority: 38 U.S.C. 101(2), 2302, 2307)

§ 5.632 Persons who may receive burial benefits.

VA may grant a claim for burial benefits that any person files for a burial expense that is reimbursable under subpart J of this part, up to the amount of the applicable statutory burial allowance or a plot or interment allowance. Except in claims a State or

an agency or political subdivision of a State files under § 5.636(a)(2) or § 5.645(a), such persons generally include (but are not limited to) the following:

(a) The funeral director, if all or any part of the bill is unpaid.

(b) Any person who used personal funds to pay or help pay burial expenses.

(c) The executor or administrator of the estate of any person, including the estate of the deceased veteran, who prepaid the burial expenses. If no executor or administrator has been appointed, VA may pay burial benefits based on a claim filed by a person acting for such estate who will make distribution of the burial benefits to the person or persons entitled to such distribution under the laws of the veteran's last State of residence.

(d) In a claim for a plot or interment allowance under § 5.645(b), the person or entity from whom the burial plot was purchased, if all or any part of the bill is unpaid.

(Authority: 38 U.S.C. 2302, 2307)

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.633 Claims for burial benefits.

(a) When claims must be filed—(1) General rule. Except as provided in paragraph (a)(2) of this section, VA must receive claims for the nonservice-connected burial allowance no later than 2 years after the burial of the veteran. If VA denies a claim for nonservice-connected burial allowance, the claimant has 2 years after the burial of the veteran to reopen the claim. There are no other time limitations to file claims for burial benefits under subpart J of this part.

(2) Correction of character of discharge. If a burial benefit was not payable at the time of the death or burial of the veteran because of the nature of the veteran's discharge from service, VA may pay the allowance if competent authority corrects a deceased veteran's discharge to reflect a discharge under conditions other than dishonorable. Claims for the nonservice-connected burial allowance must be filed no later than 2 years after the date that the discharge was corrected.

(b) Supporting evidence—(1) General rule. In order to pay burial benefits, VA must receive all of the following:

(i) A claim.

(ii) Proof of the veteran's death in accordance with § 5.500.

(iii) A statement of account, preferably on letterhead or in the form of an invoice from the funeral director or cemetery owner, showing: the name of the deceased veteran; the plot or interment expenses incurred; the dates of, and expenses incurred for, services rendered; the expenses incurred for any merchandise provided; any credits or payments received; and the unpaid balance.

(iv) A receipt, preferably on letterhead directly from the funeral director or cemetery owner, or such person's representative, showing by whom payment was made, and the name of the deceased veteran. Receipts for transportation charges must also show the dates of the services rendered.

(v) If an heir files the claim for burial expenses paid using funds from the veteran's estate or some other deceased person's estate, the claim must include waivers or evidence of unconditional consent from all other heirs, and the identity and right of all other persons to share in that estate must have been established at the time that each such person executed the waiver or gave consent.

(2) Nonservice-connected deaths. In the case of a veteran whose death was not service connected, VA may establish qualifying service based upon evidence of service that VA relied upon to grant disability compensation or pension during the veteran's lifetime, unless there is some other evidence which creates doubt as to the correctness of that evidence of service.

(Authority: 38 U.S.C. 2304, 5107(a))

§ 5.634 Reimbursable burial expenses: general.

(a) General rule. The term burial expenses as used in subpart J of this part means expenses of the funeral, transportation, and plot or interment of a deceased veteran. Generally, VA will reimburse the burial expenses identified in this subpart as reimbursable, up to the applicable statutory limit.

(b) Non-reimbursable burial expenses. VA will not reimburse for burial expenses incurred for any of the following:

(1) Flags. A privately purchased burial flag, except when VA was unable to provide a burial flag.

(2) Duplicate items. Any item or service, such as clothing or a casket, previously provided or paid for by the U.S. Government for burial purposes.

(3) Accessory items. An item or service that is not necessary or related to the funeral, burial, or transportation of the deceased veteran.

(Authority: 38 U.S.C. 2301, 2302, 2303(a), 2307)

§ 5.635 Reimbursable transportation expenses for a veteran who is buried in a national cemetery or who died while hospitalized by VA.

"Transportation expenses" for purposes of §§ 5.639 and 5.644 include, but are not limited to, the following expenses:

(a) Shipment by common carrier—(1) Pickup of remains. Charge for pickup of remains from place hospitalized or place of death but not to exceed the usual and customary charge made to the general public for the same service.

(2) Shipment. Procuring permit for shipment.

(3) Shipping case. When a box purchased for burial 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 reimbursed as a burial expense.

(4) Sealing. Expense 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) Hearse to common carrier. Expense of hearse to the point where remains are to be placed on common carrier for shipment.

(6) Transportation and Federal taxes. Expense of transportation by common carrier, including amounts paid as Federal taxes.

(7) Removal by hearse. Expense of one removal by hearse direct from common carrier plus one later removal by hearse to place of burial.

(b) Transported by hearse.—(1) Charges. Charge for pickup of remains from place hospitalized or place of death and charge for one later removal by hearse to place of burial. These charges will not exceed those made to the general public for the same services.

(2) Limitation on charges. 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.

(Authority: 38 U.S.C. 2303, 2308)

§ 5.636 Burial of a veteran whose remains are unclaimed.

(a) Unclaimed veteran's remains; burial allowance based on nonservice-connected death. When a veteran's remains are unclaimed, burial allowance is payable either:

(1) Under § 5.643, if the requirements of that section are met; or

(2) If a deceased veteran either served during wartime (as defined in § 5.20) or was discharged or released from active military service for a disability incurred or aggravated in the line of duty and the following conditions are met:

(i) The remains of the deceased veteran are being held by a State (or a political subdivision of a State); and

(ii) An appropriate official of the State (or a political subdivision of the State) where the remains are being held certifies in writing that:

(A) There is no next of kin or other person claiming the remains of the deceased veteran; and

(B) There are not sufficient resources available in the veteran's estate to cover the burial expenses.

(b) Unclaimed veteran's remains: burial allowance based on service-connected death. Benefits are payable under § 5.638 if the requirements of that section are met.

(c) Plot or interment allowance. Benefits are payable under § 5.645 if the requirements of that section are met.

(d) Burial. When a veteran's remains are unclaimed, the Director of the VA 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 § 5.645(a), if the burial expenses do not exceed the total amount payable had burial been in a national cemetery.

(Authority: 38 U.S.C. 2302(a))

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.637 [Reserved]

BURIAL BENEFITS: ALLOWANCES & EXPENSES PAID BY VA

§ 5.638 Burial allowance based on service-connected death.

(a) General rule. VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2307 to reimburse a claimant for the burial expenses paid for a veteran who died as a result of a service-connected disability or disabilities (as described in § 5.504). Subject to paragraph (c) of this section, payment of the service-connected burial allowance is in lieu of other allowances authorized by subpart J of this part.

(b) Exceptions. VA will not pay the service-connected burial allowance if:

(1) Disability compensation for the cause of death is payable only under 38 U.S.C. 1151 (which provides compensation where a disability or death was caused by

VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program); or

(2) The basis of the claim for burial allowance is entitlement to dependency and indemnity compensation under 38 U.S.C. 1318 (which provides for benefits for a survivor of certain veterans rated totally disabled on the date of death as if the cause of death were service connected).

(c) Additional allowances available based on service-connected death. In addition to the service-connected burial allowance authorized by this section:

(1) VA may reimburse for transportation expenses related to burial in a national cemetery under § 5.639; and

(2) VA may pay the plot or interment allowance for burial in a State veterans cemetery under § 5.645(a).

(Authority: 38 U.S.C. 2307, 2308)

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.639 Transportation expenses for burial in a national cemetery.

(a) Eligibility. VA will pay for the expense incurred, subject to paragraph (b) of this section, to transport a veteran's remains for burial in a national cemetery if the veteran:

(1) Died as the result of a service-connected disability;

(2) Was receiving service-connected disability compensation on the date of death; or

(3) Would have been receiving service-connected disability compensation on the date of death, but for the receipt of military retired pay or nonservice-connected disability pension.

(b) Eligibility exceptions. VA will not provide payment under this section if:

(1) Disability compensation for the cause of death is payable only under 38 U.S.C. 1151 (which provides compensation where a disability or death was caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program); or

(2) The basis of the claim for transportation expenses is entitlement to dependency and indemnity compensation under 38 U.S.C. 1318 (which provides for benefits for a survivor of certain veterans rated totally disabled on the date of death as if the cause of death was service connected).

(c) Amount payable. The amount payable under this section will not exceed the cost of transporting the remains to the national cemetery closest to the veteran's last place of residence in which burial space is available, and is subject to the limitations set forth in §§ 5.635 (relating to reimbursable transportation expenses) and 5.651 (relating to the effect of contributions by government, public, or private organizations).

(Authority: 38 U.S.C. 2308)

§§ 5.640–5.642 [Reserved]

§ 5.643 Burial allowance based on nonservice-connected death.

(a) General rule. VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2302 to reimburse a claimant for the burial expenses paid for a veteran described in paragraph (b) of this section. Payment of the nonservice-connected burial allowance is subject to the applicable further regulations in subpart J of this part.

(b) Eligibility. VA will pay a nonservice-connected burial allowance under this section for a veteran whose death was not service connected (as described in § 5.504), that is, was not the result of a service-connected disability or disabilities, when the deceased veteran on the date of death:

(1) Was receiving VA pension or disability compensation;

(2) Would have been receiving disability compensation but for the receipt of military retired pay; or

(3) Had any of the following claims pending:

(i) An original claim for pension or disability compensation, and the evidence in the claims file on the date of death and any evidence received under paragraph (d) of this section was sufficient to grant pension or disability compensation effective before the date of death; or

(ii) A claim to reopen a pension or disability compensation claim, based on new and material evidence, and the evidence in the claims file on the date of the veteran's

death and any evidence received under paragraph (d) of this section was sufficient to reopen the claim and grant pension or disability compensation effective before the date of death.

(c) Evidence in the claims file on the date of the veteran's death means evidence in VA's possession on or before the date of the deceased veteran's death, even if such evidence was not physically located in the VA claims file before the date of death.

(d) Requesting additional evidence. If the veteran had either an original claim or a claim to reopen pending on the date of death but the information in the claims file was not sufficient to grant pension or disability compensation effective before the date of death, and VA determines that additional evidence is needed to confirm that the deceased would have been entitled prior to death, VA will request such evidence. If VA does not receive such evidence within 1 year after the date of the request, the claim will be denied.

(e) Additional allowances available based on nonservice-connected death. In addition to the nonservice-connected burial allowance authorized by this section:

(1) VA may reimburse for transportation expenses related to burial in a national cemetery under § 5.639, but only if entitlement under paragraphs (b)(1) through (3) of this section is based on a claim for or award of disability compensation, rather than a claim for or award of pension; and

(2) VA may pay the plot or interment allowance for burial in a State veterans cemetery under § 5.645(a).

(Authority: 38 U.S.C. 2302, 2304)

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.644 Burial allowance for a veteran who died while hospitalized by VA.

(a) General rule. VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2303(a) to reimburse a claimant for the burial expenses paid for a veteran described in paragraph (b) of this section. VA may pay an additional amount for transportation of the remains to the place of burial, as described in paragraph (d) of this section. VA may pay an additional amount for the burial plot, as described in § 5.645. Payment under this section is subject to the applicable further regulations in subpart J of this part.

(b) Eligibility for burial allowance. A burial allowance is payable under this section for a veteran whose death was not service connected and who died while hospitalized by VA. For purposes of this allowance, a veteran was hospitalized by VA if the veteran:

(1) Was admitted 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);

(2) Was transferred or admitted 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;

(3) Was transferred or admitted to a nursing home for nursing home care at the expense of the U.S. under the authority of 38 U.S.C. 1720;

(4) Was transferred or admitted to a State nursing home for nursing home care for which payment is authorized under the authority of 38 U.S.C. 1741;

(5) Died while traveling under proper prior authorization, and at VA expense, to or from a specified place for purpose of examination, treatment, or care; or

(6) Was hospitalized by VA pursuant to paragraphs (b)(1) through (4) of this section but was not at the VA facility at the time of death and was:

(i) On authorized absence that did not exceed 96 hours at the time of death;

(ii) On unauthorized absence for a period not in excess of 24 hours at the time of death; or

(iii) Absent from the hospital for a period not in excess of 24 hours of combined authorized and unauthorized absence at the time of death.

(c) Hospitalization in the Philippines. Hospitalization in the Philippines under 38 U.S.C. 1731, 1732, and 1733 does not meet the requirements of this section.

(d) Reimbursement of transportation expenses. In addition to the burial allowance authorized by this section, VA will reimburse for the expense of transportation of the remains of a person described in paragraph (b) of this section to the place of burial where death occurs:

(1) Within a State; or

(2) Within a State but the burial is to be outside of a State, except that reimbursement for the expense of transportation of the remains will be authorized only from the place of death to the port of embarkation, or to the border limits of the U.S. where burial is in Canada or Mexico.

(Authority: 38 U.S.C. 2303, 2307)

CROSS REFERENCE: § 5.1, for the definitions of “nursing home” and “State”.

§ 5.645 Plot or interment allowance.

(a) Plot or interment allowance for burial in a State veterans cemetery. VA will pay the plot or interment allowance in the maximum amount specified in 38 U.S.C. 2303(b)(1) to a State, or an agency or political subdivision of a State, that provided a burial plot for a veteran (without regard to whether any other burial benefits were provided based on that veteran) when:

(1) The veteran was eligible for burial in a national cemetery under 38 U.S.C. 2402, but was not buried in a national cemetery or other cemetery under the jurisdiction of the U.S.;

(2) The State is claiming the plot or interment allowance for burial of the veteran in a cemetery, or section of a cemetery, owned by the State or agency or subdivision of the State;

(3) The State or agency or political subdivision of the State did not charge for the expense of the plot or interment; and

(4) The state uses the cemetery, or section of a cemetery solely for the interment of any or all of the following:

(i) Persons eligible for burial in a national cemetery;

(ii) In a claim based on a veteran dying after October 31, 2000, deceased members of a reserve component of the Armed Forces not otherwise eligible for interment in a national cemetery; or

(iii) In a claim based on a veteran dying after October 31, 2000, deceased former members of a reserve component of the Armed Forces not otherwise eligible for interment in a national cemetery who were discharged or released from service under conditions other than dishonorable.

(b) Plot or interment allowance payable based on burial in other than a State veterans cemetery. VA will provide a plot or interment allowance of up to the amount specified in 38 U.S.C. 2303(b)(2) to reimburse a claimant who incurred plot or interment expenses relating to the purchase of a burial plot for a deceased veteran who was eligible for burial in a national cemetery under 38 U.S.C. 2402 but was not buried in a national cemetery or other cemetery under the jurisdiction of the U.S. and who:

(1) Is eligible for a burial allowance under § 5.643 or § 5.644;

(2) Was discharged from active military service for a disability incurred in or aggravated in the line of duty (because in such cases, VA will accept the official service record as proof of eligibility for the plot or interment allowance and VA will disregard any

previous VA determination made in connection with a claim for monetary benefits that the disability was not incurred or aggravated in the line of duty); or

(3) Who, at the time of discharge from active military service, had a disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(c) Definitions. For purposes of subpart J of this part, 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. Plot or interment expenses are those expenses 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 remains for burial or interment.

(Authority: 38 U.S.C. 501(a), 2303(b))

CROSS REFERENCE: § 5.1, for the definition of "State".

§§ 5.646–5.648 [Reserved]

BURIAL BENEFITS: OTHER

§ 5.649 Priority of payments when there is more than one claimant.

(a) Persons who performed services or provided items. VA will reimburse, before all other claimants, a claimant who performed services or provided items (including, but not limited to, a burial plot) and who has not been fully paid for the services or items.

(b) Two or more persons used personal funds. If two or more claimants have paid personal funds toward the burial expenses, VA will divide the applicable burial benefit(s) among such claimants in proportion to the share each paid.

(c) Personal funds and veteran's estate. VA will reimburse a claimant who used his or her personal funds before VA will reimburse the estate of the deceased veteran for amounts that the estate paid toward allowable burial expenses.

(d) Plot or interment allowance. (1) An unpaid bill for a burial plot will take priority in payment of the plot or interment allowance over claims for other plot or interment expenses. Any remaining balance of the plot or interment allowance may then be applied to the other plot or interment expenses.

(2) Notwithstanding paragraphs (a) through (c) of this section, VA will provide the entire plot or interment allowance under § 5.645(a), to an eligible State, or an agency or political subdivision of a State, rather than any other claimant for plot or interment allowance.

(e) Exceptions for waivers. Any claimant may waive his or her right to receive burial benefits in favor of another claimant. However, even if a claimant waives his or her right in favor of a particular claimant, VA may not pay that the later claimant more than that claimant personally paid toward allowable burial expenses.

(Authority: 38 U.S.C. 2302, 2307)

CROSS REFERENCE: § 5.1, for the definition of "State".

§ 5.650 Escheat (payment of burial benefits to an estate with no heirs).

VA will not pay burial benefits when the payment would escheat (that is, would be turned over to the State because there are no heirs to the estate of the person to whom such benefits would be paid).

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

§ 5.651 Effect of contributions by government, public, or private organizations.

(a) Contributions by government or employer. If a claimant files a claim for nonservice-connected burial benefits and the U.S., a State, any agency or political subdivision of the U.S. or of a State, or the employer of the deceased veteran has paid or contributed to burial expenses, then VA will reimburse the claimant up to the lesser of:

(1) The allowable statutory amount; or

(2) The amount of the total burial expenses minus the amount of burial expenses paid by any or all of the organizations described in this paragraph (a).

(b) Contributions or payments by any other public or private organization. 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 nonservice-connected burial benefits if such benefits would revert to the funds of such organization or would discharge such organization's obligation without payment. This section does not apply to contributions or payments on the burial expenses made for humanitarian reasons if the organization making the contribution or payment is under no legal obligation to do so.

(c) Burial expenses paid by other agencies of the U.S.—(1) Burial allowance when Federal law or regulation also provides for payment. VA cannot pay the nonservice-connected burial allowance when any Federal law or regulation also specifically provides for the payment of the deceased veteran’s burial expenses. However, VA will pay the nonservice-connected burial allowance when a Federal law or regulation allows the payment of burial expenses using funds due, or accrued to the credit of, the deceased (such as Social Security benefits), but the law or regulation does not specifically require such payment. In such cases, VA will pay the difference between the total burial expenses and the amount paid thereon under such provision, not to exceed the amount specified in 38 U.S.C. 2302.

(2) Payment by service department. VA will not pay the burial allowance for deaths occurring during active military service or for other deaths where the service department pays the burial expenses.

(3) When a veteran dies while hospitalized. When a veteran dies while hospitalized at the expense of the U.S. government (including, but not limited to, death in a VA facility), the veteran's service department may be authorized to pay burial benefits under 10 U.S.C. 1481 or to reimburse a person who paid such expenses under 10 U.S.C. 1482. The deceased veteran may also qualify for VA burial benefits. Only one of these benefits is payable. VA will attempt to locate the nearest relative or person entitled to reimbursement and will ask that person to elect between these benefits.

(d) Effect of payments made to a designated beneficiary of contract or insurance policy. A contract or insurance policy that provides for payment on the death of a veteran to a designated beneficiary, who is not the person who actually provided the burial and funeral services, will not bar VA's payment of burial benefits to the beneficiary. Payment is not barred even if the organization that issued the contract or policy has the option of making payment directly to the provider of the burial and funeral services.

(Authority: 38 U.S.C. 2302(b), 2307)

CROSS REFERENCE: § 5.1, for the definitions of "political subdivision of the U.S." and "State".

§ 5.652 Effect of forfeiture on payment of burial benefits.

(a) Forfeiture for fraud. VA will pay burial benefits, if otherwise in order, based on a deceased veteran who forfeited his or her right to receive benefits due to fraud under § 5.676. However, VA will not pay burial benefits to a claimant who participated in fraudulent activity that resulted in forfeiture under § 5.676.

(b) Forfeiture for treasonable acts or for subversive activity. VA will not pay burial benefits based on a period of service commencing before the date of commission of the offense where either the veteran or claimant has forfeited the right to all benefits except insurance payments under § 5.677, or § 5.678, because of a treasonable act or subversive activities, unless the offense was pardoned by the President of the U.S.

(Authority: 38 U.S.C. 6103, 6104, 6105)

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.653 Eligibility based on status before 1958.

When any person dies who had a status under any law in effect on December 31, 1957, that afforded entitlement to burial benefits, 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. chapter 23.

(Authority: 38 U.S.C. 2305)

§§ 5.654–5.659 [Reserved]

Subpart K—Matters Affecting the Receipt of Benefits

BARS TO BENEFITS

§ 5.660 In the line of duty.

(a) Effect of line of duty findings on claims adjudication. Except as provided in §§ 5.246 and § 5.247, VA may grant service connection only for a disability or death that was incurred or aggravated in the line of duty.

(b) Definition. Except as provided in paragraph (c) of this section, an injury, disease, or cause of death was incurred or aggravated "in the line of duty" when that injury, disease, or cause of death was incurred or aggravated during a period of active military service and was not the result of either of the following actions:

(1) The veteran's willful misconduct under § 5.661; or

(2) The veteran's abuse of alcohol or drugs under § 5.662.

(c) Exceptions. An injury, disease, or cause of death does not meet line of duty requirements if it was incurred or aggravated at a time that the veteran was:

(1) Avoiding duty by desertion;

(2) Absent without leave, which materially interfered with the performance of military duty;

(3) Confined under a sentence of court-martial involving an unremitted dishonorable discharge; or

(4) Confined under sentence of a court other than a U.S. military court for a felony under the laws of the jurisdiction of such court.

(d) Weight given service department findings. A service department finding that an injury, disease, or death occurred in the line of duty will be binding on VA unless the finding is patently inconsistent with the laws administered by VA.

(Authority: 38 U.S.C. 101(16), 105, 1110, 1131)

CROSS REFERENCE: § 5.1, for the definitions of "drugs" and "willful misconduct". § 5.140(b), Determining former prisoner of war status, (concerning whether the detention or internment of a former prisoner of war was in the line of duty).

§ 5.661 Willful misconduct.

(a) Definitions. See § 5.1 for the definitions of "willful misconduct," "proximately caused," and "drugs".

(b) Effect of willful misconduct findings on claims adjudication. (1) VA may not grant service connection for a disability or death resulting from injury or disease

proximately caused by the veteran's willful misconduct, and VA may not pay disability compensation for disability due to such injury, disease, or death. This paragraph (b) applies to service connection established under any provision of this part, including, but not limited to, §§ 5.246 and 5.247. It also applies to compensation awarded under § 5.350.

(2) VA may not grant disability or death pension for any condition proximately caused by the veteran's willful misconduct.

(c) Use of alcohol or drugs constituting willful misconduct—(1) Alcohol. (i) If a person consumes alcoholic beverages to the point of intoxication and that intoxication proximately causes injury, disease, or death, VA will consider the injury, disease, or death to have been proximately caused by willful misconduct.

(ii) Organic diseases and injuries that are proximately caused by the chronic use of alcohol as a beverage will not be considered of willful misconduct origin. However, § 5.662(b), may preclude VA from awarding service connection for such diseases or injuries.

(2) Drugs. (i) If a person uses drugs in a manner not legally prescribed to the point of intoxication and that intoxication proximately causes injury, disease, or death, VA will consider the injury, disease, or death to have been proximately caused by willful misconduct.

(ii) Organic diseases that are proximately caused by the chronic use of drugs and infections coinciding with the injection of drugs will not be considered of willful

misconduct origin. However, VA may be precluded by § 5.662(b) from awarding service connection for such diseases.

(iii) The use of drugs as directed for therapeutic purposes is not willful misconduct.

(iv) The use of drugs proximately caused by a service-connected disability is not willful misconduct.

(d) Suicide constituting willful misconduct—(1) General rule. (i) If an act of self-destruction is intentional, it constitutes willful misconduct.

(ii) 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).

(iii) In order for a death resulting from suicide to be service connected, the precipitating mental unsoundness be service connected.

(2) Evidence of mental condition. (i) Whether a person, at the time of suicide, was so unsound mentally that he or she did not realize the consequences 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.

(ii) VA considers the act of suicide or a bona fide attempt to be evidence of mental unsoundness. Therefore, where the evidence shows no reasonable, adequate motive for suicide, VA will consider the act to have resulted from mental unsoundness.

(iii) Competent evidence showing circumstances which could lead a rational person to self-destruction may establish a reasonable, adequate motive for suicide.

(3) Evaluation of evidence. (i) Competent evidence is necessary to justify reversal of service department findings of mental unsoundness where VA's criteria do not otherwise warrant contrary findings.

(ii) In all instances, reasonable doubt should be resolved in favor of supporting a finding of service connection (see § 5.249).

(e) Venereal disease. VA will not consider the residuals of venereal disease to be the result of willful misconduct. 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 the line of duty will not govern.

(f) Weight to be given to service department findings. A service department finding that willful misconduct did not proximately cause injury, disease, or death will be binding on VA unless it is clearly and unmistakably inconsistent with the facts and the laws administered by VA.

(Authority: 38 U.S.C. 105, 501(a), 1110, 1131, 1151, 1521)

§ 5.662 Alcohol and drug abuse.

(a) Definitions.—(1) Alcohol abuse means the consumption of alcoholic beverages over time, or excessive use at any one time.

(2) Drug abuse means the intentional use of drugs for a purpose other than their medically intended use or in a manner not prescribed or directed.

(b) Service connection for alcohol or drug abuse. Except as provided in paragraph (c) of this section, VA will not deem an injury or disease incurred during active military service to have been incurred in the line of duty if the abuse of alcohol or drugs proximately caused such injury or disease.

(c) Alcohol or drug abuse related to, or a part of, a service-connected injury or disease. (1) VA may grant service connection for a disability or death proximately caused by the abuse of alcohol or drugs that is secondary to a service-connected injury or disease.

(2) VA will consider the effect of the abuse of alcohol or drugs in evaluating the severity of a service-connected disability under the Schedule for Rating Disabilities in part 4 of this chapter if competent evidence shows that the service-connected disability proximately caused the abuse of alcohol or drugs.

(d) Accidental use. The accidental use of prescription or non-prescription drugs or other substances is not drug abuse unless the accident was due to impaired judgment caused by one or more of the following elements:

(1) Alcohol abuse;

(2) Drug abuse; or

(3) The use of alcohol or drugs constituting willful misconduct under § 5.661(c), Willful misconduct.

(Authority: 38 U.S.C. 105(a), 501(a), 1110, 1131)

CROSS REFERENCE: § 5.1, for the definitions of "drugs," "proximately caused," and "willful misconduct".

§ 5.663 Homicide as a bar to benefits.

(a) Definitions. The following definitions apply to this section:

(1) Excuse means that the death was caused by a person who was insane at the time of the act causing the death.

(2) Homicide means intentionally causing the death of a person, without excuse or justification. Homicide includes causing the death of the person directly or abetting someone else in causing the death.

(3) Justification means that there was a lawful reason for causing the death, including, but not limited to, acting in self-defense or in defense of another person, as provided in paragraph (c) of this section.

(b) Homicide as a bar to benefits. VA will not award pension, disability compensation, or dependency and indemnity compensation (including benefits under 38 U.S.C. 1318), or any increase in those benefits, to which the person responsible for the homicide would otherwise be entitled because of the death of the person slain.

(c) Self-defense, or defense of another. A killing is justified as having been committed in self-defense or defense of another if the evidence establishes that the killer reasonably believed that:

(1) He or she, or another person, was in immediate danger of death or serious bodily harm from the deceased;

(2) There was no way to escape or retreat in order to avoid the danger of death or serious bodily harm; and

(3) The action causing the death was necessary to avoid the danger of death or serious bodily harm.

(d) Effect of court of law proceeding on VA finding of homicide—(1) Conviction. Subject to the requirement of intent in paragraph (a) of this section, VA will accept a court of law conviction of homicide as binding.

(2) Other situations. In all other situations, including those in which a court acquitted the person of criminal charges or reversed the conviction on appeal and the person has not been retried, VA will determine whether the evidence clearly and unmistakably demonstrates that the person committed or abetted the commission of the homicide, as defined in paragraph (a) of this section.

(e) Effect of court of law proceeding on VA finding of insanity at time of killing. VA will accept as binding a court's determination that a person was insane at the time of

the killing. In other cases, if insanity is alleged, VA will determine whether the person was insane.

(f) Effect of homicide on eligibility for death benefits—(1) General rule. The general rule is that VA will make payments to eligible innocent beneficiaries as if the person who committed the homicide did not exist.

(2) Homicide of a veteran by the veteran's spouse. If a veteran's spouse commits homicide of the veteran, VA will pay benefits to the veteran's eligible child as if there were no surviving spouse.

(3) Homicide of veteran by the veteran's child. The following rules apply if a veteran's child commits homicide of the veteran:

(i) VA will pay to the veteran's surviving spouse any additional benefits to which the spouse is entitled on account of that child, if the surviving spouse has actual or constructive custody of the child.

(ii) If the surviving spouse does not have actual or constructive custody of the child, VA will pay death benefits to the eligible surviving spouse as if the child did not exist.

(iii) VA will pay death benefits to any other child of the veteran (including apportionments of benefits based on the veteran's death) as if the child who committed the homicide did not exist.

(4) Homicide of a veteran by the veteran's parent. If a veteran's parent commits homicide of the veteran, VA will pay to the veteran's other parent any benefits to which he or she is entitled as if the parent who committed the homicide did not exist.

(5) Homicide of one claimant or beneficiary by another claimant or beneficiary. If a VA claimant or beneficiary commits homicide of another VA claimant or beneficiary, the person who committed the homicide cannot receive any increase in benefits based on the death of the victim. For example, if both beneficiaries are children of a deceased veteran, the child who committed the homicide is not entitled to any increase in benefits based on the death of the deceased child. If one of the veteran's parents is responsible for the homicide of the other parent, the parent who committed the homicide is not entitled to receive benefits, or an increase in benefits, based on being a sole surviving parent.

(6) Homicide and accrued benefits. VA pays accrued benefits to various classes of claimants (for example, a child). VA ranks these classes in order of priority for payment of benefits. See § 5.551. The homicide of a person who is a member of a higher priority class by a person in a lower priority class will not entitle the wrongdoer to such benefits. The homicide of one member of a class by a person in the same class will not entitle the wrongdoer to an increased share of the benefits payable to the members of that class because of the death of the person slain.

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

CROSS REFERENCE: § 5.1, for the definitions of "custody of a child" and "insanity".

§§ 5.664–5.674 [Reserved]

§ 5.675 General forfeiture provisions.

(a) Forfeiture does not bar benefits based on later periods of service. Forfeiture of benefits based on one period of service does not affect entitlement to benefits based on a later period of service that begins after the commission of the offense(s) that caused the forfeiture.

(b) Violation of hospital rules not grounds for forfeiture. Pension or disability compensation benefits are not subject to forfeiture because of violation of hospital rules.

(Authority: 38 U.S.C. 501(a), 6103–6105)

§ 5.676 Forfeiture for fraud.

(a) Definition of fraud. See § 5.1.

(b) Forfeiture for fraud after September 1, 1959—(1) Persons subject to forfeiture. After September 1, 1959, forfeiture for fraud will be found only if:

(i) The person committing the fraud was not residing or domiciled in a State at the time of the commission of the fraud;

(ii) The person committing the fraud ceased to be a resident of or domiciled in a State before expiration of the period during which criminal prosecution could be instituted; or

(iii) The fraud was committed in the Philippine Islands.

(2) Effect of forfeiture for fraud. Any person for whom forfeiture for fraud is found forfeits all rights to benefits provided under this part. The forfeiture applies to both current and future benefit entitlement.

(3) Effect on dependents of forfeiture for fraud—(i) Apportionment. After September 1, 1959, VA may not apportion benefits forfeited for fraud.

(ii) Death benefits. See paragraph (d) of this section.

(iii) Burial benefits. See § 5.652.

(4) Effective date of forfeiture. See § 5.681.

(5) Suspension for fraud. When a case is recommended for forfeiture for fraud in accordance with § 5.679, VA will suspend payment of benefits, effective the first day of the month after the month for which VA last paid benefits. If VA ultimately decides that forfeiture is not appropriate, VA will restore payments effective the day benefits were suspended, if otherwise in order.

(c) Forfeiture before September 2, 1959—(1) Forfeitures continue to bar benefits. Any forfeiture in effect before September 2, 1959, continues to bar benefits on and after September 2, 1959, except where there is a Presidential pardon for commission of the offense(s) leading to the forfeiture, or where VA revokes the forfeiture under § 5.680.

(2) Effect on a dependent of forfeiture for fraud—(i) Apportionment of disability compensation—(A) When payable. Disability compensation a veteran forfeited for fraud may be paid to the veteran's spouse, child, or parent if the forfeiture was found

before September 2, 1959, and if VA authorized the apportionment before September 2, 1959.

(B) Amount that VA may apportion. The total apportioned amount is the lesser of the service-connected death benefit that would be payable if the veteran were dead or the amount of disability compensation that VA would have paid to the veteran but for the forfeiture.

(C) Participation in the fraud bars apportionment. VA may not apportion benefits forfeited for fraud to any dependent who participated in the fraud that caused the forfeiture.

(ii) Death benefits. See paragraph (d) of this section.

(3) Revocation. See § 5.680(c).

(d) Death benefits—(1) Veteran's fraud does not bar a dependent's death benefits. Forfeiture of a veteran's benefits for fraud does not bar the award of death pension, death compensation, or dependency and indemnity compensation to an eligible dependent.

(2) Dependent's participation in fraud bars death benefits. VA may not pay death benefits to any surviving dependent who participated in the fraud that caused the forfeiture of the veteran's benefits.

(e) Presidential pardons. See § 5.682.

(Authority: 38 U.S.C. 501(a), 6103)

CROSS REFERENCE: § 5.1, for the definitions of “fraud” “State”. § 5.679, Forfeiture decision procedures.

§ 5.677 Forfeiture for treasonable acts.

(a) Definition of treasonable acts. For purposes of this section, “treasonable acts” are acts of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or its allies.

(b) Forfeiture for treasonable acts after September 1, 1959—(1) Persons subject to forfeiture. After September 1, 1959, forfeiture for treasonable acts will be found only where:

(i) The person committing the treasonable act was not residing or domiciled in a State at the time of the commission of the treasonable act;

(ii) The person committing the treasonable act ceased to be a resident of or domiciled in a State before expiration of the period during which criminal prosecution could be instituted; or

(iii) The treasonable act was committed in the Philippine Islands.

(2) Effect of a forfeiture for treasonable acts. Any person for whom forfeiture for treasonable acts is found after September 1, 1959, forfeits all rights to benefits provided under this part. The forfeiture applies to both current and future benefit entitlement.

(3) Effect on dependents of a forfeiture for treasonable acts. After September 1, 1959, VA has no authority to make either of the following awards to a dependent of a veteran who forfeited benefits for treasonable acts:

(i) An apportionment award of the forfeited benefits; or

(ii) An award of benefits provided under this part to the veteran's dependent based on a period of the veteran's active military service that began before the date of commission of the treasonable acts.

(4) Effective date of forfeiture. See § 5.681.

(5) Suspension for treasonable acts. When a case is recommended for consideration of forfeiture for treasonable acts in accordance with § 5.679, VA will suspend payment of benefits, effective the first day of the month after the month for which VA last paid benefits. If VA ultimately decides that forfeiture is not appropriate, VA will restore payments effective the day benefits were suspended, if otherwise in order.

(c) Forfeiture before September 2, 1959—(1) Forfeitures continue to bar benefits. Any forfeiture in effect before September 2, 1959, continues to bar benefits after September 1, 1959, except where there is a Presidential pardon for commission of the offense(s) leading to the forfeiture, or where VA revokes the forfeiture under the provisions of § 5.680.

(2) Effect on a dependent of a forfeiture for treasonable acts—(i) Apportionment of forfeited benefits—(A) When payable. If forfeiture for treasonable acts was found before September 2, 1959, and if VA authorized the apportionment before September 2,

1959, VA may pay any part of the forfeited benefits to a dependent of the person who forfeited benefits, as follows:

(B) Amount of disability compensation that may be apportioned. If the forfeited benefit is disability compensation, the total amount payable to a veteran's spouse, child, and parent is the lesser of the service-connected death benefit that would be payable if the veteran were dead or the amount of disability compensation that would have been paid to the veteran but for the forfeiture.

(C) Amount of pension that VA may apportion. If the forfeited benefit is pension, the total amount payable to a veteran's spouse and child is the lesser of the nonservice-connected death benefit that would be payable if the veteran were dead or the amount of pension being paid to the veteran at the time of the forfeiture.

(D) Participation in the treasonable acts bars apportionment. VA may not apportion benefits forfeited for treasonable acts to any dependent of a beneficiary who participated in the treasonable acts that caused the forfeiture.

(ii) Death benefits. VA may pay death pension, death compensation, or dependency and indemnity compensation to an eligible surviving dependent of a veteran who forfeited benefits for a treasonable act if all of the following elements are true:

(A) The forfeiture was found before September 2, 1959;

(B) The specified death benefits were authorized before September 2, 1959; and

(C) The payee of the specified death benefits did not participate in the treasonable acts that caused the forfeiture.

(d) Effect of a child's treasonable act on the benefits of a surviving spouse. Treasonable acts committed by a child in the surviving spouse's custody do not affect the spouse's award of additional death benefits for that child.

(e) Presidential pardons. See § 5.682.

(Authority: 38 U.S.C. 501(a), 6103(d)(1), 6104)

CROSS REFERENCE: § 5.1, for the definitions of "custody of a child" and "State". § 5.679, Forfeiture decision procedures.

§ 5.678 Forfeiture for subversive activity.

(a) Definition of subversive activity. "Subversive activity" is any of the following offenses for which the United States Code prescribes punishment:

(1) Title 10, Armed Forces (Uniform Code of Military Justice).

(i) Section 894 (Art. 94, Mutiny or sedition).

(ii) Section 904 (Art. 104, Aiding the enemy).

(iii) Section 906 (Art. 106, Spies).

(2) Title 18, Crimes and Criminal Procedure.

(i) Section 792, Harboring or concealing persons.

(ii) Section 793, Gathering, transmitting, or losing defense information.

(iii) Section 794, Gathering or delivering defense information to aid foreign government.

(iv) Section 798, Disclosure of classified information.

(v) Section 2381, Treason.

(vi) Section 2382, Misprision of treason.

(vii) Section 2383, Rebellion or insurrection.

(viii) Section 2384, Seditious conspiracy.

(ix) Section 2385, Advocating overthrow of Government.

(x) Section 2387, Activities affecting armed forces generally.

(xi) Section 2388, Activities affecting armed forces during war.

(xii) Section 2389, Recruiting for service against U.S.

(xiii) Section 2390, Enlistment to serve against U.S.

(xiv) Chapter 105, Sabotage.

(3) Title 18, Crimes and Criminal Procedure—claims filed after December 15, 2003. With respect to the forfeiture of benefits awarded on the basis of claims filed after December 15, 2003, the following offenses in Title 18 are also subversive activities:

(i) Section 175, Prohibitions with respect to biological weapons.

(ii) Section 229, Prohibited activities.

(iii) Section 831, Prohibited transactions involving nuclear materials.

(iv) Section 1091, Genocide.

(v) Section 2332a, Use of certain weapons of mass destruction.

(vi) Section 2332b, Acts of terrorism transcending national boundaries.

(4) Title 42, The Public Health and Welfare.

(i) Section 2272, Violation of specific sections.

(ii) Section 2273, Violation of sections.

(iii) Section 2274, Communication of Restricted Data.

(iv) Section 2275, Receipt of Restricted Data.

(v) Section 2276, Tampering with Restricted Data.

(5) Title 50, War and National Defense. Section 783, Offenses.

(b) Indictment or conviction for subversive activity—(1) Sources of notification. The Secretary of Defense or the Secretary of Homeland Security, as applicable, notifies VA in each case in which a person is convicted of an offense listed in paragraph (a)(1) of this section. The Attorney General notifies VA in each case in which a person is indicted or convicted of an offense listed in paragraphs (a)(2) through (5) of this section.

(2) Indictment—(i) VA action on notice of indictment. Upon receipt of notice of the return of an indictment for subversive activity, VA will suspend payment of benefits provided under this part to the person indicted pending disposition of the criminal proceedings. VA will suspend payments effective the first day of the month after the month for which VA last paid benefits.

(ii) VA action on notice of acquittal. If the person indicted for subversive activity is acquitted or otherwise not convicted, VA will restore payments effective the day benefits were suspended, if otherwise in order.

(3) Conviction—(i) VA action on notice of conviction. Upon receipt of notice that a VA beneficiary was convicted after September 1, 1959, of subversive activity, VA will make a decision on forfeiture as provided in § 5.679(c)(1).

(ii) Benefits forfeited. Any person convicted of subversive activity forfeits all rights to benefits provided under this part. The forfeiture applies to both current and future benefits.

(iii) Effective date of forfeiture upon conviction. See § 5.681(b)(3).

(iv) Effect on dependent. VA may not award benefits provided under this part to the dependent of a veteran who was convicted of subversive activity after September 1, 1959, if the award would be based on a period of the veteran's active military service that began before the date of commission of the subversive activity.

(c) Presidential pardons—(1) Restoration of forfeited benefits. See § 5.682.

(2) Restoration of benefits for a surviving dependent. Upon application following Presidential pardon for the offenses leading to forfeiture for subversive activity, VA may pay a veteran's dependent death pension, death compensation, or dependency and indemnity compensation, if the dependent is otherwise eligible for that benefit.

(Authority: 38 U.S.C. 501(a), 6105)

§ 5.679 Forfeiture decision procedures.

(a) Officials authorized to make a forfeiture decision, recommend forfeiture, or refer forfeiture cases—(1) Forfeiture decisions. Forfeiture decisions will be made by an official authorized under § 5.5.

(2) Recommendation of forfeiture. The Regional Counsel of the region of the residence of the person or of the agency of original jurisdiction having jurisdiction over

the person who is the subject of the forfeiture (or in the Philippines, the Manila Veterans Service Center Manager (VSCM)), may recommend forfeiture and submit the case to an official described in paragraph (a)(1) of this section.

(3) Referral of forfeiture cases. The following persons may refer cases to the Regional Counsel or VSCM in Manila, as appropriate, for consideration whether to recommend the case for forfeiture:

(i) The director of a Veterans Benefits Administration service;

(ii) The Chairman, Board of Veterans' Appeals; or

(iii) The General Counsel.

(b) VA obligations prior to recommending forfeiture based on fraud or treasonable acts. Before recommending forfeiture for fraud or treasonable acts under paragraph (a) of this section, the Regional Counsel or, in Manila, Philippines, the VSCM must provide the beneficiary or claimant with written notice that VA is proposing to make a forfeiture decision and of the right to present a defense. No recommendation of forfeiture will be made until at least 60 days after the notice is sent, or until a hearing is held if one is requested within the period specified in paragraph (b)(5) of this section. The notice will be sent to the person's latest address of record and will include the following information:

(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) A citation and discussion of the applicable statute;

(4) The right to file a statement or evidence no later than 60 days after the date of the notice, either to rebut the charges or explain the person's position;

(5) The right to request a hearing no later than 60 days after the date of the notice, with representation by counsel of the person's choosing; and

(6) Information that fees for representation are limited in accordance with 38 U.S.C. 5904, Recognition of agents and attorneys generally, and that VA will not pay expenses incurred by a claimant, his or her counsel, or witnesses.

(c) Standards for forfeiture—(1) Forfeiture upon conviction of engaging in subversive activity. An official authorized under § 5.5 will make a decision to forfeit benefits when notified that a VA beneficiary has been convicted of an offense involving subversive activity.

(2) Forfeiture for engaging in fraud or treasonable acts. An official authorized under § 5.5 will make a forfeiture decision when the official determines that the evidence shows beyond a reasonable doubt that a VA claimant or beneficiary has engaged in fraud as defined in § 5.676(a) or one or more treasonable acts as defined in § 5.677(a).

(d) Administrative appeal. An authorized VA official may file an administrative appeal of a forfeiture decision under the provisions in § 19.51 of this chapter.

(e) Finality of forfeiture decisions. Forfeiture decisions are final and binding under the provisions in § 5.160(a); § 20.1103 of this chapter,or § 20.1104 of this chapter, as applicable.

(Authority: 38 U.S.C. 501(a), 512(a), 6103, 6104)

CROSS REFERENCE: § 5.1, for the definitions of "agency of original jurisdiction," "final decision," and "fraud."

§ 5.680 Revocation of forfeiture.

(a) Authority to make revocation decisions. Revocations of forfeiture decisions will be made by an official authorized under § 5.5(b).

(b) Bases for revocation. VA will revoke a forfeiture in only the following cases:

(1) Upon a showing that the forfeiture decision was the product of clear and unmistakable error under § 5.162;

(2) Upon the submission of new and material evidence under § 5.55; or

(3) When a forfeiture for fraud was imposed before September 2, 1959, as provided in paragraph (c) of this section.

(c) Special rules for revocation of a forfeiture for fraud imposed before September 2, 1959—(1) Basis for revocation. If a forfeiture for fraud was imposed before September 2, 1959, and that forfeiture would not be imposed under the statutes

and regulations in effect on and after September 2, 1959, then VA will revoke the forfeiture.

(2) Effective dates—(i) Effective date of revocation. Revocation of a forfeiture under paragraph (c)(1) of this section is effective June 30, 1972.

(ii) Effective date of payments. Upon receipt of an application, VA will award benefits under paragraph (c)(1) of this section effective as of the date provided by § 5.152.

(3) Deduction of apportionment payments—(i) Applicability. This paragraph (c) applies when all of the following elements are true:

(A) VA revoked a forfeiture under paragraph (c)(1) of this section;

(B) During the period of time that the forfeiture was in effect, VA apportioned some or all of the forfeited benefits to the beneficiary's dependent as provided in § 5.676(c)(2), Forfeiture for fraud; and

(C) The revocation results in payments being due to the beneficiary for periods during which VA paid the apportionment to the beneficiary's dependent.

(ii) Deduction. VA will reduce the payments to the beneficiary by the amount of apportioned benefits paid to the beneficiary's dependent during the period stated in paragraph (c)(3)(i)(C) of this section.

(Authority: 38 U.S.C. 501(a), 6103(d)(2))

CROSS REFERENCE: § 5.1, for the definition of "fraud".

§ 5.681 Effective dates: forfeiture.

(a) Suspension upon recommendation of forfeiture for fraud or treasonable acts—(1) Suspension on recommendation for forfeiture. VA will suspend payment, effective the first day of the month after the month for which VA last paid benefits, upon receipt of notice from a VA Regional Counsel, or from the Veterans Service Center Manager in Manila, Philippines, when such an official recommends forfeiture for fraud or treasonable acts pursuant to § 5.679.

(2) Restoration of payments where forfeiture for fraud or treasonable acts is not warranted. VA will restore payments effective the first day of the month after the month for which VA last paid benefits, if otherwise in order, if VA decides that forfeiture is not appropriate.

(b) Effective dates of forfeiture—(1) Forfeiture for fraud. A forfeiture of benefits for fraud is effective the later of the effective date of the award of the forfeited benefits or the day before the commission of the act resulting in forfeiture.

(2) Forfeiture for treasonable acts. A forfeiture of benefits for treasonable acts is effective the earlier of the date of the forfeiture decision or the first day of the month following the month for which VA last paid benefits.

(3) Forfeiture for subversive activity. A forfeiture of benefits for conviction for subversive activity is effective the later of the effective date of the award of the forfeited benefits or the day before the commission of the subversive activity for which the beneficiary was convicted.

(Authority: 38 U.S.C. 5112(a), (b)(9); 6105)

CROSS REFERENCE: § 5.1, for the definition of “fraud”.

§ 5.682 Presidential pardon for offenses causing forfeiture.

(a) Restoration of rights to benefits. If the President of the U.S. pardons the offenses that were the basis of a forfeiture decision, VA will restore rights to all forfeited benefits effective the date of the pardon, if otherwise in order.

(b) Effective date of resumption of payment of monetary benefits. Once VA has restored the beneficiary’s rights under paragraph (a) of this section, VA will resume payment of forfeited VA monetary benefits, if otherwise in order, as follows:

(1) If an application is filed no later than 1 year after the date of the pardon, VA will restore payments effective the date of the pardon; or

(2) If an application is filed more than 1 year after the date of the pardon, VA will restore payments effective the date of receipt of the application.

(c) Payment subject to recovery of overpayments. Payment of VA monetary benefits, following Presidential pardon of the offenses that were the basis of a forfeiture decision, is subject to recovery of any existing overpayments.

(d) Discontinuance of apportionments. VA will discontinue any benefits apportioned to a dependent under § 5.676(c)(2)(i), or § 5.677(c)(2)(i), effective the day before the date of the pardon.

(Authority: 38 U.S.C. 501(a), 6105(a))

§ 5.683 Renouncement of benefits.

(a) Who may renounce a benefit. A person entitled to receive disability compensation, pension, or dependency and indemnity compensation (DIC) under the laws administered by VA may renounce his or her right to any benefit.

(b) How to renounce a benefit. The renouncement of the right to receive a benefit must be in writing and must be signed by the person entitled to that benefit, and not by a representative. The renouncement must be for the entire benefit, not a portion of it.

(c) Effective date of renouncement. VA will discontinue payment of renounced benefits effective the first day of the month following the month in which VA received the renouncement. If payments had been suspended, VA will discontinue payment of renounced benefits effective the first day of the month after the month for which VA last paid benefits.

(d) Effect of renouncement of DIC on the rights of another beneficiary—(1) Effect on another beneficiary in the same class. The renouncement of DIC by one person entitled to that benefit does not increase the rate payable to any other DIC beneficiary in the same class. For example, the renouncement of DIC by one child will not increase the DIC rate payable to another child.

(2) Effect of renouncement by a surviving spouse on rights of a child. The renouncement of DIC by a surviving spouse does not entitle a child under age 18 to DIC, or increase the DIC rate payable to a child over age 18.

(e) Reapplying for renounced benefits—(1) General rules. (i) A person who renounced the right to receive a benefit may reapply for the same benefit at any time. VA will treat the new application as an original claim.

(ii) Except as otherwise provided in paragraph (e)(2) of this section, the effective date of the award of benefits resulting from the new application will be the date of receipt of that application.

(2) Special rule applicable to pension and parents' DIC benefit renouncements. If a person who has renounced pension or parents' DIC benefits files a new application for the same benefit no later than 1 year after renouncement, the application will not be treated as an original application and the benefit will be payable as if VA never received the renouncement.

(Authority: 38 U.S.C. 501(a), 5112(a), 5306)

CROSS REFERENCE: § 5.83(c)(4) (concerning when VA will send a contemporaneous notice of reduction, discontinuance, or other adverse action).

§§ 5.684–5.689 [Reserved]

Subpart L: Payments and Adjustments to Payments

GENERAL RATE-SETTING AND PAYMENTS

§ 5.690 Where to find benefit rates and income limits.

(a) Rates of payment. The rates of the following payments for benefits and income limitations on qualification for benefits are available on VA's public website at http://www.va.gov:

(1) Disability compensation;

(2) Death compensation;

(3) Dependency and indemnity compensation;

(4) Old-Law Pension;

(5) Section 306 Pension;

(6) Improved Pension; and

(7) Monthly allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

(b) Income limits. The income limitations for the following benefit programs are available on VA's public website at http://www.va.gov:

(1) Old-Law Pension;

(2) Section 306 Pension;

(3) Improved Pension; and

(4) Parents' dependency and indemnity compensation.

(c) Whenever there is an increase in the rates listed in this section, VA will publish notice in the Federal Register.

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

§ 5.691 Adjustments for fractions of dollars.

(a) Calculation of adjusted annual income or annual income. For purposes of entitlement to pension, VA will round down to the nearest dollar when calculating adjusted annual income. See § 5.370, for the definition of adjusted annual income. For purposes of entitlement to parents' dependency and indemnity compensation (DIC), VA will round down to the nearest dollar when calculating annual income. See §§ 5.531 through 5.534 for how to calculate parents' DIC annual income.

(Authority: 38 U.S.C. 1503(b))

(b) Calculation of increased rates and income limits. VA will round up to the nearest dollar when calculating the increase due to a cost-of-living adjustment of any of the following amounts:

(1) Improved Pension maximum annual pension rates;

(2) Old-Law Pension and Section 306 Pension annual income limits;

(3) Income of a spouse when excluded from a veteran's countable annual income for Old-Law Pension and Section 306 Pension purposes;

(4) Parents' DIC annual rates and income limits; or

(5) The monthly allowance rates under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

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

(c) Calculation of monthly or other pension rates. VA will round down to the nearest dollar the amount of Improved Pension or Section 306 Pension payable.

(Authority: 38 U.S.C. 5123)

§ 5.692 Fractions of one cent not paid.

VA will not pay fractions of a cent when paying any benefit.

(Authority: 38 U.S.C. 501(a), 5312(c)(2))

§ 5.693 Beginning date for certain benefit payments.

(a) Definition. For purposes of this section, increased award means a benefit payment increased as a result of:

(1) An added dependent;

(2) An increase in disability or disability rating, including, but not limited to, a temporary increased rating;

(3) A reduction in income;

(4) An election of Improved Pension under § 5.463, Effective dates of Improved Pension elections;

(5) Except as provided in paragraph (c)(6) of this section, a temporary total rating under § 4.29 of this chapter; or

(6) A temporary total rating under § 4.30 of this chapter.

(b) Beginning payment date rule. VA will pay benefits identified in this paragraph (b) beginning the first day of the month after the month in which the award or increased award becomes effective, except as provided in paragraph (c) of this section. However, VA will consider beneficiaries to be in receipt of monetary benefits as of the effective date of the award or increased award. This paragraph (b) applies to awards or increased awards of the following benefits based on an original claim, reopened claim, or claim for increase:

(1) Disability compensation;

(2) Pension;

(3) Dependency and indemnity compensation (DIC); or

(4) The monetary allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

(c) Exceptions to beginning payment date rule. VA will begin payment of each of the following awards as of its effective date:

(1) Awards that provide only for continuity of entitlement with no increase in the rate of payment.

(2) Awards restoring a previously reduced benefit because the circumstances requiring reduction no longer exist.

(3) Awards to a surviving spouse at the veteran's rate for the month of the veteran's death.

(4) Awards that change any withholding, reduction, or suspension because of:

(i) Recoupment;

(ii) An offset to collect indebtedness;

(iii) Receipt of hospital, domiciliary, or nursing home care;

(iv) Incompetency;

(v) Incarceration; or

(vi) Discontinuance of apportionment.

(5) Benefit increases resulting solely from the enactment of certain types of legislation, including, but not limited to, the following:

(i) Cost-of-living increases for disability compensation and DIC for surviving spouses and children;

(ii) Increases in the maximum annual pension rate for Improved Pension;

(iii) Increases in the income limits and maximum monthly rate for parents' DIC;

(iv) Increases in the monetary allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects; and

(v) Statutory changes in the criteria for the award of special monthly compensation.

(6) Awards based on temporary total ratings under § 4.29 of this chapter when the entire period of hospitalization or treatment, including any period of post-hospitalization convalescence, begins and ends within the same calendar month. In such cases the period of payment will begin on the first day of the month in which the hospitalization or treatment began.

(7) Apportionments of benefits.

(8) Certain awards of disability compensation to a veteran who is also eligible for retired pay, as described in paragraph (d)(1) of this section.

(9) Awards to a veteran's dependent of benefits that the veteran was receiving or entitled to receive when the veteran disappeared for 90 days or more.

(10) Certain awards of disability compensation to a veteran who was retired or separated for a catastrophic disability, as described in paragraph (e) of this section.

(d) Cases involving waiver of retired pay. (1) If the veteran's retired pay, as defined in § 5.745(a), is greater than the amount of VA disability compensation payable, VA will pay disability compensation from the effective date the veteran waives such retired pay.

(2) If the amount of VA disability compensation payable is greater than the veteran's retired pay, VA's payment of the difference for any period before the effective date of the veteran's waiver of such retired pay is subject to the beginning payment date provision of paragraph (b) of this section.

(3) Nothing in this section precludes the veteran from receiving retired pay before the effective date of waiver of such pay.

(e) Cases involving catastrophic disability. If a veteran was retired or separated from the active military service for a catastrophic disability or disabilities, then VA will pay any compensation awarded based on an original claim as of its effective date as provided in this part. For purposes of this section, catastrophic disability means a permanent, severely disabling injury, disorder, or disease that compromises the ability of the veteran to carry out the activities of daily living to such a degree that he or she requires personal or mechanical assistance to leave home or bed, or requires constant supervision to avoid physical harm to self or others.

(Authority: 38 U.S.C. 501(a), 1832, 5111, 5305)

5.694 Deceased beneficiary.

When VA discontinues benefits because the beneficiary has died, the discontinuance will be effective the first day of the month in which the beneficiary died. (Authority: 38 U.S.C. 1822, 1832, 5112(b)(1))

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

(a) Month-of-death benefit. For purposes of this section, month-of-death benefit means a payment to a deceased veteran's surviving spouse for the month in which the veteran died and in the amount of disability compensation or pension that the veteran would have received for that month, if not for his or her death.

(b) Surviving spouse entitled to death pension or dependency and indemnity compensation (DIC) for the month of the veteran's death. (1) Surviving spouse's award greater than veteran's award. If the surviving spouse is entitled to death pension or DIC for the month of the veteran's death in an amount greater than the amount of disability compensation or pension that the veteran would have received for that month if not for his or her death, then the surviving spouse is not entitled to a month-of-death benefit.

(2) Surviving spouse's award equal to or less than veteran's award. If the surviving spouse is entitled to death pension or DIC for the month of the veteran's death in an amount equal to or less than the amount of disability compensation or pension that the veteran would have received for that month but for his or her death, then VA will pay the surviving spouse death pension or DIC for the month of the veteran's death in an amount equal to the amount of disability compensation or pension the veteran would have received for that month if not for his or her death.

(c) Surviving spouse not entitled to death pension or DIC for the month of death. If a veteran who was receiving disability compensation or pension dies after December

31, 1996, and the surviving spouse is not entitled to death pension or DIC for the month of the veteran's death, then the surviving spouse is entitled to the month-of-death benefit. If the veteran died before January 1, 1997, then such veteran's surviving spouse is not entitled to the month-of-death benefit.

(d) Payment issued to deceased veteran. If VA issues payment of compensation or pension to a deceased veteran for the month of his or her death, VA will treat the payment as the month-of-death benefit payable to a surviving spouse who is otherwise eligible for payment under paragraph (b) of this section. If the surviving spouse negotiates or deposits the payment issued to a deceased veteran, then VA will consider the payment to be the benefit to which the surviving spouse is entitled under paragraph (b) of this section. However, if such payment is less than the amount the surviving spouse would receive under paragraph (b) of this section, VA may pay the unpaid difference as accrued benefits. See § 5.1 for the definition of "accrued benefits".

(e) When a veteran dies on or after August 6, 2012, the veteran's surviving spouse is entitled to the month-of-death benefit if: (1) The veteran was receiving disability compensation or pension when he or she died; or

(2) VA determines under §§ 5.551 through 5.555 that the veteran was entitled to receive such compensation or pension, or a higher rate of compensation or pension that the veterans was receiving when he or she died. If VA determines that the veteran was entitled to a higher rate of compensation or pension than VA had previously paid as a

month-of-death benefit to the surviving spouse, then VA will pay the difference to the surviving spouse.

(Authority: 38 U.S.C. 5111(c), 5310)

§ 5.696 Payments to or for a child pursuing a course of instruction at an approved educational institution.

(a) Definition of approved educational institution. For purposes of this section, approved educational institution means an institution defined in § 5.220(b)(2) that is approved by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 104(a))

(b) Payment of Improved Pension or additional disability compensation.—(1) Entitlement. If a veteran's child is at least 18 but less than 23 years old and is pursuing a course of instruction at an approved educational institution:

(i) VA will pay the veteran additional disability compensation if the veteran has service-connected disability rated at least 30 percent disabling;

(ii) VA may pay the veteran a higher rate of Improved Pension;

(iii) VA may pay a surviving spouse a higher rate of Improved Death Pension; or

(iv) VA may pay the child Improved Death Pension if no surviving spouse is eligible to receive Improved Death Pension or if the surviving spouse does not have custody of the child. See § 5.1, for the definition of "custody of a child".

(2) Effective date of award of Improved Pension or additional disability compensation. (i) Child began a course of instruction at an approved educational institution on or before the child's 18th birthday. If a child began a course of instruction at an approved educational institution on or before the child's 18th birthday and VA receives a claim on, before, or no later than 1 year after the child's 18th birthday , the effective date will be the child's 18th birthday.

(ii) Child began a course of instruction at an approved educational institution after the child's 18th birthday. If a child began a course of instruction at an approved educational institution after the child's 18th birthday and VA receives a claim no later than 1 year after the date the child began the course, the effective date will be the date the child began the course of instruction at an approved educational institution.

(c) Payment of dependency and indemnity compensation (DIC) to a child not receiving DIC before the child's 18th birthday. If a child was not receiving DIC before the child's 18th birthday, VA will pay DIC directly to the child for periods beginning on or after the child's 18th birthday if the child is entitled to DIC and is pursuing a course of instruction at an approved educational institution. The effective date of the award of DIC will be as follows:

(1) Child was pursuing a course of instruction at an approved educational institution on the child's 18th birthday.—(i) Child on a surviving spouse's award. The effective date will be the child's 18th birthday if:

(A) Immediately before the child's 18th birthday, the child was a dependent on a surviving spouse's DIC award;

(B) The child began the course of instruction on or before the child's 18th birthday; and

(C) VA receives a claim for DIC on, before , or no later than 1 year after the child's 18th birthday.

(ii) Child not on a surviving spouse's award. The effective date will be the first day of the month of the child's 18th birthday if:

(A) Immediately before the child's 18th birthday, the child was not a dependent on a surviving spouse's DIC award;

(B) The child began the course of instruction at an approved educational institution on or before the child's 18th birthday; and

(C) VA receives a claim for DIC on, before, or no later than 1 year after the child's 18th birthday.

(2) Child began a course of instruction after the child's 18th birthday. The effective date will be the first day of the month in which the child began the course of instruction at an approved educational institution if:

(i) The child began the course after the child's 18th birthday; and

(ii) VA receives a claim for DIC no later than 1 year after the date the child began the course.

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

CROSS REFERENCE: § 5.573, Effective date for dependency and indemnity compensation rate adjustments when an additional survivor files an application, for information on the impact on awards to other children.

(d) Payment of DIC to a child receiving DIC before the child's 18th birthday.—(1) Entitlement. VA may pay DIC directly to a child for periods beginning on or after the child's 18th birthday if:

(i) VA paid DIC to the child before the child's 18th birthday; and

(ii) The child is pursuing a course of instruction at an approved educational institution.

(2) Effective dates. The effective date for the payment of DIC to the child will be as follows:

(i) Child began a course of instruction on or before the child's 18th birthday. VA will pay DIC effective on the child's 18th birthday if:

(A) The child began the course of instruction on or before the child's 18th birthday; and

(B) VA receives evidence of such school attendance on, before, or no later than 1 year after the child's 18th birthday.

(ii) Child began a course of instruction after the child's 18th birthday. VA will pay DIC benefits effective the date the child began the course of instruction if:

(A) The child began the course of instruction after the child's 18th birthday; and

(B) VA receives evidence of such school attendance no later than 1 year after the date the child began the course of instruction.

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

CROSS REFERENCE: § 5.524, Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild, for the rate of payment.

(e) Claims filed outside the 1-year period. If VA receives a claim referred to in paragraphs (b) or (c) of this section, or evidence referred to in paragraph (d) of this section, after the expiration of the 1-year period, the effective date will be the date VA receives the claim or evidence.

(f) Payments for vacation or holiday periods.—(1) Child returns to an approved educational institution. A child is considered to be pursuing a course of instruction at an approved educational institution during a vacation or holiday period if the child:

(i) Was pursuing a course of instruction at an approved educational institution immediately before the vacation or holiday period; and

(ii) Resumes the course at the beginning of the next term either at the same or a different approved educational institution.

(2) Child fails to return to an approved educational institution. When VA has paid benefits for a vacation or holiday period, and the child does not resume the course, VA will discontinue benefits effective the first day of the month after the month for which

VA last paid benefits, or the first day of the month that the child was scheduled to resume the course, whichever date is earlier.

(Authority: 38 U.S.C. 5112(b)(7))

(g) Ending dates.—(1) Course of instruction completed. If a child completes a course of instruction, then VA will discontinue benefits payable under this section effective the first day of the month after the month in which the course was completed.

(2) Termination of course of instruction before completion. Except as provided in paragraph (f)(2) of this section, if a course of instruction is terminated before completion, then VA will discontinue benefits payable under this section effective the first day of the month after the month in which the course of instruction was terminated.

(h) Transfer to another course of instruction or another educational institution. VA will not adjust payments previously made under this section because the child changed a course of instruction or transferred to a different approved educational institution.

(i) Bars to benefit payments under this section. VA will not pay benefits under this section if:

(1) The child has elected to receive educational assistance under 38 U.S.C. chapter 35 (see § 5.764 and § 21.3023 of this chapter); or

(2) The child is pursuing a course of instruction at an approved educational institution where the child is completely supported at the expense of the Federal Government, such as a military service academy.

(Authority: 38 U.S.C. 501(a), 3562)

§ 5.697 Exchange rates for income received or expenses paid in foreign currencies.

(a) Pension and parents' dependency and indemnity compensation (DIC) rates. In determining the rate of pension or parents' DIC payable to a person, VA will convert the amount of income received or expenses paid in foreign currencies into U.S. dollars using the quarterly exchange rates established by the U.S. Department of the Treasury as provided in this section. Benefits will be paid in U.S. dollars.

(1) Calculation of pension or parents' DIC rates. Because exchange rates for foreign currencies cannot be determined in advance, VA will estimate pension or parents' DIC rates using the most recent quarterly exchange rate. When the beneficiary or claimant informs VA of a change in income or expenses that would affect entitlement, VA will make retroactive benefit adjustments based on the exchange rate in effect at the time VA received notice of the change in income or expenses.

(2) Retroactive adjustments due to changes in exchange rates. (i) For retroactive adjustments to pension or parents' DIC rates due to changes in the currency exchange rate, VA will use the average of the four most recent quarterly exchange rates.

(ii) If income or expenses are reported for a prior reporting period, VA will calculate any retroactive benefit rate adjustment using the average of the four most recent quarterly exchange rates that were available on the last day of the reporting period for which the income is being reported. See § 5.708(a)(2) for the definition of "reporting period".

(b) Benefits and funds payable as reimbursement for expenses paid in foreign currency.—(1) Applicability. This paragraph (b) applies to payment of the following benefits or funds:

(i) Monetary burial benefits paid under subpart J of this part;

(ii) Accrued benefits paid in accordance with § 5.551(e), as reimbursement to the person who bore the expense of the deceased beneficiary's last sickness or burial;

(iii) Funds in the special deposit account paid in accordance with § 5.565(b)(4), as reimbursement to the person who bore the expense of the burial of the payee;

(iv) Funds in a personal-funds-of-patients account paid in accordance with § 5.566(d)(4); and

(v) Funds paid in accordance with § 5.567(a)(4).

(2) General rule. If benefits or funds are payable as reimbursement for expenses paid in foreign currency, VA will calculate the payment amount using the quarterly exchange rate for the quarter in which expenses were paid. If the U.S. Department of the Treasury has not yet published a rate for that quarter, VA will calculate the payment amount using the most recent quarterly exchange rate. Payments will be made in U.S. dollars.

(3) Exception. If benefits or funds are payable to an unpaid creditor for charges billed in foreign currency, VA will calculate the payment amount using the quarterly exchange rate for the quarter in which the veteran, beneficiary, or payee died. If the U.S. Department of the Treasury has not yet published a rate for that quarter, VA will calculate the payment amount using the most recent quarterly exchange rate. Payments will be made in U.S. dollars.

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

§§ 5.698–5.704 [Reserved]

GENERAL REDUCTIONS, DISCONTINUANCES, AND RESUMPTIONS

§ 5.705 General effective dates for reduction or discontinuance of benefits.

(a) General rules. Except as otherwise provided, VA will assign an effective date for the reduction or discontinuance of disability compensation, pension, dependency and indemnity compensation (DIC), or the monetary allowances under chapter 18 of title 38, United States Code, in accordance with the facts found. If more than one effective-date provision applies to a particular issue or event, VA will reduce or discontinue the benefit(s) on the earliest applicable effective date. VA will pay a reduced rate or discontinue benefits effective the date of reduction or discontinuance.

(b) Reduction and discontinuance table. The following table lists the locations of specific reduction and discontinuance effective-date provisions in this part 5. The table is solely for informational purposes, and does not confer any substantive rights.

Effective-date provision	**Part 5 location**
SUBPART C – ADJUDICATIVE PROCESS, GENERAL	
Filing a claim for death benefits	§ 5.52
Requirement to provide Social Security numbers	§ 5.101(c)
Failure to report for VA examination or reexamination	§ 5.103(d)
Certifying continuing eligibility to receive benefits	§ 5.104(c)
Effective dates based on change of law or VA issue	§ 5.152(c)
Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on omission or commission, or based on administrative error or error in judgment	§ 5.167
Effective dates for reducing or discontinuing a benefit payment or for severing service connection	§ 5.177
SUBPART D – DEPENDENTS AND SURVIVORS	
Effective date of reduction or discontinuance based on changes in dependency status	§ 5.184
Void or annulled marriages	§ 5.196
Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage	§ 5.197
Effect of remarriage on a surviving spouse's benefits	§ 5.203
Effective date of reduction or discontinuance: child reaches age 18 or 23	§ 5.231
Effective date of reduction or discontinuance: terminated adoptions	§ 5.232
Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household	§ 5.233
Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support	§ 5.234
SUBPART E – CLAIMS FOR SERVICE CONNECTION AND DISABILITY COMPENSATION	
Effective dates—discontinuance of total disability rating based on individual unemployability	§ 5.313
Effective dates—reduction or discontinuance of additional disability compensation based on parental dependency	§ 5.314
Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321	§ 5.336(b)

SUBPART F – NONSERVICE-CONNECTED DISABILITY PENSIONS AND DEATH PENSIONS	
Effective dates of changes to annual Improved Pension payment amounts due to a change in income	§ 5.422
Improved Pension determinations when expected annual income is uncertain	§ 5.423
Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse	§ 5.433
Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved	§ 5.434
Effective dates for discontinuances of Old-Law Pension and Section 306 Pension	§ 5.477
SUBPART G – DEPENDENCY AND INDEMNITY COMPENSATION, DEATH COMPENSATION, ACCRUED BENEFITS, AND SPECIAL RULES APPLICABLE UPON DEATH OF A BENEFICIARY	
Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild	§ 5.524(c)
Discontinuance of dependency and indemnity compensation to a person no longer recognized as the veteran's surviving spouse	§ 5.539(b)
Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved	§ 5.540
Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade	§ 5.541
Effective date of reduction or discontinuance based on increased income: parents' dependency and indemnity compensation	§ 5.543
Dependency and indemnity compensation rate adjustments when an additional survivor files a claim	§ 5.544(b)
Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation	§ 5.545(b)
SUBPART H – SPECIAL AND ANCILLARY BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS	
Awards of benefits based on special acts or private laws	§ 5.581(d), (e)
Effective dates of awards for a disabled child of a Vietnam or Korea veteran	§ 5.591(b)
SUBPART I – BENEFITS FOR CERTAIN FILIPINO VETERANS AND SURVIVORS	
Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor	§ 5.618

SUBPART K – MATTERS AFFECTING THE RECEIPT OF BENEFITS	
Effective dates: forfeiture	§ 5.681
Presidential pardon for offenses causing forfeiture	§ 5.682(d)
Renouncement of benefits	§ 5.683(c)
SUBPART L – PAYMENTS AND ADJUSTMENTS TO PAYMENTS	
Deceased beneficiary	§ 5.694
Payments to or for a child pursuing a course of instruction at an approved educational institution	§ 5.696(b) - (g)
Eligibility verification reports	§ 5.708(e)
Adjustment in benefits due to reduction or discontinuance of a benefit to another payee	§ 5.710(b)
Payment to dependents due to the disappearance of a veteran for 90 days or more	§ 5.711(d)
Suspension of benefits due to the disappearance of a payee	§ 5.712
Restriction on benefit payments to an alien located in enemy territory	§ 5.713
Reduction of special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.720(b), (e), (f)
Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	§ 5.721(a)
Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care	§ 5.722(a), (d), (f), (g)
Adjustment of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility	§ 5.723(b), (c)
Adjustment or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.724(a), (c), (d)
Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	§ 5.725(a), (c)
Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.726(a), (d)
Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.727(a), (c)
Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.728(a), (c)
Resumption of Section 306 Pension and Section 306 Pension	§ 5.729(a), (d)

based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care	
Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care	§ 5.730(a)
General effective dates for awarding, reducing, or discontinuing VA benefit benefits because of an election	§ 5.743(b)
Prohibition against receipt of active military service pay and VA benefits for the same period	§ 5.746(c)
Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits	§ 5.754(d)
Payment of multiple VA benefits to a surviving child based on the service of more than one veteran	§ 5.762(c)(6)(ii)
Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period	§ 5.764
SUBPART M – APPORTIONMENTS TO DEPENDENTS AND PAYMENTS TO FIDUCIARIES AND INCARCERATED BENEFICIARIES	
Effective date of reduction or discontinuance of apportionment	§ 5.783
Determinations of incompetency and competency	§ 5.790(f)
Incarcerated beneficiaries – general provisions and definitions	§ 5.810(f)

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

§ 5.706 Payments excluded in calculating income or net worth.

(a) Scope. This section lists payments excluded by Federal statutes from income and net worth determinations when VA determines eligibility for benefits that are based on financial need. These benefits are Improved Pension, Section 306 Pension, Old-Law Pension, parents' dependency and indemnity compensation (DIC), and additional amounts of veterans' compensation payable for dependent parents. Income

and net worth rules applying solely to a specific benefit are included in the regulations that deal with that specific benefit.

(b) Specific payments excluded. The following table states whether certain payments are included or excluded as income or net worth for any VA-administered benefit program that is based on financial need. This table does not confer any substantive rights.

Program or Payment	Income	Net Worth	Authority
COMPENSATION OR RESTITUTION PAYMENTS			
(1) Relocation payments. Payments to persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.	Excluded	Included	42 U.S.C. 4636
(2) Crime victim compensation. Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime.	Excluded	Excluded	42 U.S.C. 10602(c)
(3) Restitution to persons of Japanese ancestry. Payments made as restitution under Pub. L. 100-383 to a person of Japanese ancestry who was interned, evacuated, or relocated during the period of December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these persons.	Excluded	Excluded	50 U.S.C. App. 1989b-4(f)

Program or Payment	Income	Net Worth	Authority
(4) Victims of Nazi persecution. Payments made to persons because of their status as victims of Nazi persecution.	Excluded	Excluded	Sec. 1(a), Pub. L. 103-286, 108 Stat. 1450, 42 U.S.C. 1437a note
(5) Agent Orange settlement payments. Payments 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.).	Excluded	Excluded	Sec. 1, Pub. L. 101-201, 103 Stat. 1795
(6) Chapter 18 benefits. Allowances paid under 38 U.S.C. chapter 18 to a veteran's child with a birth defect.	Excluded	Excluded	38 U.S.C. 1833(c)
PAYMENTS TO NATIVE AMERICANS			
(7) Indian judgment fund distributions. First $2,000 of income received by individual Indians under 25 U.S.C. 1407(1)-(4).	Excluded	Excluded	25 U.S.C. 1407
(8) Interests of individual Indians in trust or restricted lands. Income received by individual Indians that is derived from interests in trust or restricted lands.	First $2,000 per year Excluded	Excluded	25 U.S.C. 1408
(9) Submarginal land. Income derived from certain submarginal land of the U.S. that is held in trust for certain Indian tribes.	Excluded	Excluded	25 U.S.C. 459e
(10) Old Age Assistance Claims Settlement Act. First $2,000 per capita distributions under the Old Age Assistance Claims Settlement Act.	Excluded	Excluded	25 U.S.C. 2307

Program or Payment	Income	Net Worth	Authority
(11) Alaska Native Claims Settlement Act. Any of the following, if received from a Native Corporation, under the Alaska Native Claims Settlement Act: (i) Cash, including cash dividends on stocks and bonds, up to a maximum of $2,000 per year; (ii) Stock, including stock issued as a dividend or distribution; (iii) Bonds that are subject to the protection under 43 U.S.C. 1606(h) until voluntarily and expressly sold or pledged by the shareholder after the date of distribution; (iv) A partnership interest; (v) Land or an interest in land, including land received as a dividend or distribution on stock; (vi) An interest in a settlement trust.	Excluded	Excluded	43 U.S.C. 1626(c)
(12) Maine Indian Claims Settlement Act. Payments received under the Maine Indian Claims Settlement Act of 1980.	Excluded	Excluded	25 U.S.C. 1728
WORK-RELATED PAYMENTS			
(13) Workforce investment. Allowances, earnings, and payments to persons participating in programs under the Workforce Investment Act of 1998 (29 U.S.C. chapter 30).	Excluded	Included	29 U.S.C. 2931(a)(2)
(14) AmeriCorps participants. Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990.	Excluded	Included	42 U.S.C. 12637(d)
(15) Volunteer work. Payments to volunteers involved in programs administered from the Corporation for National and Community Service, unless the payments are equal to or greater than the minimum wage. The minimum wage is either under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et. seq.) or under the law of the State where the volunteers are serving, whichever is greater.	Excluded	Excluded	42 U.S.C. 5044(f)
MISCELLANEOUS PAYMENTS			

Program or Payment	Income	Net Worth	Authority
(16) Food stamps. Value of the allotment provided to an eligible household under the Food Stamp Program.	Excluded	Excluded	7 U.S.C. 2017(b)
(17) Food for children. Value of free or reduced price for food under the Child Nutrition Act of 1966.	Excluded	Excluded	42 U.S.C. 1780(b)
(18) Child care. Value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990.	Excluded	Excluded	42 U.S.C. 9858q
(19) Services for housing recipients. Value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act.	Excluded	Excluded	42 U.S.C. 8011(j)(2)
(20) Home energy assistance. The amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act.	Excluded	Excluded	42 U.S.C. 8624(f)
(21) Programs for older Americans. Payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965 (42 U.S.C. chapter 35).	Excluded	Included	42 U.S.C. 3020a(b)
(22) Student financial aid. Amounts of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs or under Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998.	Excluded	Excluded	20 U.S.C. 1087uu, 2415(a)
(23) Retired Serviceman's Family Protection Plan annuities. Annuities received under subchapter 1 of the Retired Serviceman's Family Protection Plan.	Excluded	Included	10 U.S.C. 1441
(24) Medicare Prescription Drug Discount Card and Transitional Assistance Program.	Excluded	Excluded	42 U.S.C. 1395w–141(g)(6)

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

§ 5.707 Deductible medical expenses.

(a) Scope. This section describes the medical expenses that VA will deduct from countable income for purposes of three of VA's benefit programs based on financial need: Improved Pension, Section 306 Pension, and parents' dependency and indemnity compensation (DIC).

CROSS REFERENCES: For the rules governing how such medical expenses are deducted, see §§ 5.413, Income deductions for calculating adjusted annual income, (regarding Improved Pension), 5.474, Deductible Expenses for Section 306 Pension Only, and 5.532 Deductions from income for parent's dependency and indemnity compensation.

(b) Definition of licensed health care provider. For purposes of this section, the term licensed health care provider means a person licensed to provide health care in the state in which the person provides health care. The term includes, but is not limited to, physicians, registered nurses, licensed vocational nurses, and licensed practical nurses.

(c) Medical expenses – general. If there is more than one way to categorize a medical expense under this paragraph (c), VA will categorize it in the way that is most

favorable to the claimant or beneficiary. The following payments are medical expenses that will be deducted from income if they are not reimbursed:

(1) Care by a licensed health care provider. Payments for diagnosis, treatment, rehabilitation, or preventive maintenance (such as an annual physical examination) provided by a licensed health care provider.

(2) Medical supplies and medications. Payments for prescribed medication and legal non-prescription medication, as well as medically necessary food, beverages, and vitamins that a licensed health care provider authorized to write prescriptions directs a person to take.

(3) Adaptive equipment. Payments for adaptive devices or companion animals used to assist a person with an ongoing disability, to the extent that a non-disabled person would not normally make such payments.

(4) Transportation expenses. Payments for transportation for medical purposes, including transportation to and from a licensed health care provider's office. VA will deduct the full cost of parking, taxi, bus, or other transportation. However, VA limits the deductible expense per mile for travel by private vehicle to the amount stated on VA Form 21-8416, Medical Expense Report. That form may be obtained at http://www.va.gov.

(5) Health insurance premiums. Payments for health, medical, and hospitalization insurance premiums. This category includes Medicare premiums.

(6) Institutional forms of care and in-home attendants.—(i) Nursing home care. Payments to a facility that provides extended term inpatient medical care, if a

responsible official of the facility certifies that the person is a patient (as opposed to a resident) in the facility.

(ii) In-home attendant. Payments for an in-home attendant for the personal care of a person and maintenance of the person's immediate environment, if the attendant is also providing some medical or nursing care. The following provisions also apply:

(A) If the person needs regular aid and attendance or is housebound, then the attendant need not be a licensed health care provider.

(B) Except as provided in paragraph (c)(6)(ii)(C) of this section, if the person neither needs of regular aid and attendance nor is housebound, then the attendant must be a licensed health care provider.

(C) If the person is neither a surviving spouse nor a veteran and a physician has stated that the person requires the level of medical or nursing care provided by the in-home attendant, then the attendant need not be a licensed health care provider.

(iii) Veterans in State homes. Payments to a State home, such as a veterans' or soldiers' and sailors' home operated by a State, if:

(A) The veteran is a patient (as opposed to a resident) in the State home; and

(B) The veteran is receiving hospital, domiciliary, or nursing home care in the State home.

(iv) Custodial care. Payments for custodial care (including room and board), nursing care, and medical treatment to an institution that houses and maintains a person because the person needs to live in a protected environment. One of the following conditions must be met:

(A) The person needs regular aid and attendance or is housebound; or

(B) A licensed physician has certified that the person needs to live in a protected environment because of a medical condition.

(v) Custodial care in a government institution. Payments to a government institution that houses and maintains a person because the person needs to live in a protected environment. One of the following conditions must be met:

(A) A licensed physician has certified that the person needs to live in a protected environment because of a medical condition; or

(B) The person is participating in a physician-supervised program of therapy or rehabilitation.

(vi) Adult day care, rest homes, group homes. Payments to an adult day care facility, rest home, group home, or similar facility, if the facility provides some medical or nursing care to the person. The care need not be provided by a licensed health care provider. One of the following conditions must be met:

(A) The person needs regular aid and attendance or is housebound; or

(B) A licensed physician has certified that the person needs the care provided by the facility.

(Authority: 38 U.S.C. 501(a), 1315(f)(3), 1503(a)(8))

§ 5.708 Eligibility verification reports.

(a) Definitions. (1) An eligibility verification report (EVR) is a form used to obtain information from claimants and beneficiaries about factors that may affect entitlement to pension or parents' dependency and indemnity compensation (DIC). See § 5.709(b).

(2) A reporting period is a period established by VA for which a claimant or beneficiary reports income, adjustments to income, and net worth to VA.

(b) Circumstances when VA may require completion of an EVR. As a condition of receipt or continued receipt of benefits, claimants or beneficiaries of pension or parents' DIC must, file a completed EVR upon VA's request in the following circumstances:

(1) EVRs for claimants. VA may require a claimant to file a completed EVR when necessary to update, complete, or clarify information regarding the claimant's income or marital status or any other factor that affects entitlement.

(2) EVRs for beneficiaries. (i) Annual EVRs. VA may require a beneficiary to file a completed EVR annually.

NOTE TO PARAGRAPH (b)(2)(i): VA does not require the following beneficiaries to file EVRs annually: a beneficiary in receipt of Old-Law Pension or Section 306 Pension, a beneficiary in receipt of Improved Pension whose only income is Social Security benefits, or a parent who has reached age 72 and has been receiving parents' DIC for 2 consecutive calendar years.

(ii) Other circumstances. VA may require a beneficiary to file a completed EVR if:

(A) The Social Security Administration has not verified the social security number of the beneficiary or, if applicable, the beneficiary's spouse;

(B) Evidence suggests that the beneficiary or, if applicable, the beneficiary's spouse or child, may have received income from sources other than the Social Security Administration during the current or previous calendar year; or

(C) The Secretary decides completion of an EVR is necessary to ensure accurate and timely reporting of changes in the factors that affect entitlement or to protect the pension and parents' DIC programs from fraud.

(c) Action VA takes upon receipt of information or of an EVR. When VA receives new information in an EVR or through other means, VA may reconsider entitlement, adjust the amount of benefits paid, or request additional information, as appropriate.

CROSS REFERENCE: §§ 5.423(a); 5.531(e); and 5.478(a), Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension (regarding the action VA takes when expected annual income exceeds income limits for Old-Law Pension or Section 306 Pension).

(d) Action VA takes when a claimant does not return a completed EVR. If VA does not receive a completed EVR within 60 days after the date VA requested the EVR from a claimant, VA will deny the claim.

(e) Action VA takes when a beneficiary does not return a completed EVR.—(1) Failure to return an EVR. If VA does not receive an EVR within 60 days after the date

VA requested the EVR from a beneficiary, VA will immediately suspend future benefit payments.

(2) Return of an incomplete EVR. If VA receives an incomplete EVR no later than 60 days after the date VA requested the EVR from a beneficiary, VA will notify the beneficiary of the additional information needed to complete the EVR. If VA does not receive a completed EVR within 120 days after the date VA first requested the EVR, then VA will immediately suspend future benefit payments.

(3) Discontinuance for failure to return a completed EVR. A beneficiary whose benefits were suspended under paragraph (e)(1) or (2) of this section must return the completed EVR no later than 1 year after the date VA first requested the EVR. Otherwise, VA will discontinue benefits as follows:

(i) If the reporting period is the initial reporting period, the effective date of discontinuance is the first day of that period; or

(ii) If the reporting period is a subsequent reporting period, the effective date of discontinuance is the first day of the calendar year for which VA requested the beneficiary provide the information in the EVR.

(f) Action VA takes when a beneficiary returns an EVR after benefits were suspended or discontinued. If VA suspended or discontinued benefits under paragraph (e) of this section, then VA will resume payments (if otherwise in order) as follows:

(1) If VA receives the completed EVR no later than 1 year after the end of the reporting period for which VA requested the beneficiary provide the EVR, then VA will resume payment of benefits as follows:

(i) Payments suspended but not discontinued. If payments were suspended but not discontinued, effective the date of suspension.

(ii) Payments discontinued. If payments were discontinued, effective the date of discontinuance.

(2) If VA receives the completed EVR more than 1 year after the end of the reporting period, VA will treat the EVR as a new claim.

(g) VA will accept the EVR at any time to reduce or eliminate a debt. A beneficiary or former beneficiary who owes or owed money to VA because VA discontinued payments for failure to file an EVR within the time limit in paragraph (e)(3) of this section may file the EVR at any time to reduce or eliminate a debt. If, based on information in the EVR, VA decides that the beneficiary or former beneficiary was entitled to benefits for any part of the period for which VA discontinued payment for failure to file an EVR, VA will reduce the debt accordingly. If the debt is eliminated, VA will not pay additional benefits for that period.

(Authority: 38 U.S.C. 501(a), 1315(e), 1506)

§ 5.709 Claimant and beneficiary responsibility to report changes.

(a) General rule. Claimants and beneficiaries of pension or parents' dependency and indemnity compensation (DIC) must promptly notify VA of any material change in a factor that affects entitlement to the benefit that they are claiming or receiving. VA may request any information or evidence that is necessary to determine

whether the person is entitled (or continues to be entitled) to a benefit. See § 5.708, Eligibility verification reports, (explaining the circumstances when VA will require an eligibility verification report).

(b) Table of factors affecting entitlement to pension or parents' DIC. The following table lists factors that often change and that affect entitlement to pension or parents' DIC. The table is intended solely for informational purposes. It does not list every factor that could affect entitlement to pension or parents' DIC.

Benefit Type (Beneficiary)		**Claimant/Beneficiary and applicable Dependent (s)**	**Factors affecting Claimant/Beneficiary's entitlement to pension or parents' DIC benefits. ("YES" indicates that the factor may affect entitlement. "NO" indicates that the factor does not affect entitlement)**					
			Income	Marital status	Net worth	Number of children (See § 5.220)	Nursing home status	School attendance (if 18 or older)
Improved	Disability Pension (Veteran)	Veteran	YES	YES	YES	YES	YES	NO
		Dependent spouse	YES	YES	YES	YES	NO	NO
		Dependent child	YES [1]	YES	YES	NO	NO	YES
	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	YES	YES	YES	NO
		Dependent child	YES [1]	YES	YES	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES [1]	YES	YES	NO	NO	YES
		Child's legal custodian	YES [4]	NO	YES	NO	NO	NO
Section 306	Disability Pension (Veteran)	Veteran	YES	YES	YES	YES	YES	NO
		Dependent spouse	YES [2]	YES	NO	YES	NO	NO
		Dependent child	NO	YES	NO	NO	NO	YES

	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	YES	YES	YES	NO
		Dependent child	YES[3]	YES	NO	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES [5]	YES	YES	NO	NO	YES
		Child's legal custodian	NO	NO	NO	NO	NO	NO
Old-Law	Disability Pension (Veteran)	Veteran	YES	YES	NO	YES	YES	NO
		Dependent spouse	NO	YES	NO	YES	NO	NO
		Dependent child	NO	YES	NO	NO	NO	YES
	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	NO	YES	YES	NO
		Dependent child	YES[3]	YES	NO	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES	YES	NO	NO	NO	YES
		Child's legal custodian	NO	NO	NO	NO	NO	NO
Parents' DIC (Surviving parent)		Surviving parent	YES	YES	NO	NO	YES	NO
		Surviving parent's spouse	YES [6]	YES	NO	NO	YES	NO

[1] A child's earned income (wages and/or salary) is not a factor under certain circumstances described in § 5.411(b), Counting a child's income for Improved Pension payable to a child's parent.

[2] For exceptions to this rule, see § 5.473, Counting a dependent's income for Old-Law Pension and Section 306 Pension.

[3] A child's income is not a factor unless it is turned over to the surviving spouse. (See § 5.473)

[4] The income of a custodian is a factor unless the custodian is an institution rather than a person.

[5] Only unearned income (income other than wages and/or salary) is a factor. (See § 5.473)

[6] The income of a surviving parent's spouse is a factor unless the parent and spouse are not living together.

(Authority: 38 U.S.C. 501(a); 1315; 1521(b), (c), and (h); 1522; 1541(b), (c), and (g);

1542; 1543; sec. 306, Pub. L. 95-588, 92 Stat. 2497)

§ 5.710 Adjustment in benefits due to reduction or discontinuance of a benefit to another payee.

(a) Effect of reduction or discontinuance of a payee's benefit. If a payee becomes entitled to pension, disability compensation, or dependency and indemnity compensation, or an increase in such a benefit because VA reduced or discontinued payment of the same benefit to another payee , then VA will pay the award or increase without the filing of a new claim, except as provided in paragraph (b)(2)(ii) of this section.

(b) Effective dates.—(1) Sufficient information and evidence available. If there is sufficient information and evidence for VA to award or increase the payee's benefit, then the effective date of the award or increase is the day of the reduction or discontinuance of the benefit to the other payee.

(2) Insufficient information and evidence. If there is not sufficient information or evidence for VA to award or increase the payee's benefit, then VA will request additional information or evidence.

(i) If VA receives the information or evidence no later than 1 year after the date of VA's request, then VA will award or increase the payee's benefit and pay the appropriate rate effective the day of the reduction or discontinuance of the benefit to the other payee.

(ii) If VA does not receive the information or evidence within 1 year after the date of VA's request, then the payee must file a new claim. The effective date of the award or increase will be the date VA receives the new claim.

(c) Rate payable. The rate for the person who becomes entitled pursuant to this section will be the rate that would have been payable if he or she had been the only original person entitled.

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

§ 5.711 Payment to dependents due to the disappearance of a veteran for 90 days or more.

(a) General rule.—(1) Entitlement. When a veteran who is receiving or entitled to receive disability compensation, Section 306 Pension, or Improved Pension disappears for 90 days or more, VA will pay the benefit to the veteran's dependent(s) as provided in this section. VA will pay dependents under this section only if the veteran's whereabouts are unknown to the dependent(s) and to VA and VA receives a claim from the dependent(s).

(2) Definition. For purposes of this section, entitled to receive means that VA has granted a claim for one of the benefits listed in paragraph (a)(1) of this section but has not yet paid the veteran.

(b) Veteran receiving or entitled to receive disability compensation. If the veteran was receiving or entitled to receive disability compensation, VA may pay it to the veteran's spouse, child, or dependent parent.

(1) Rate payable. The total rate that VA will pay the veteran's dependent(s) is the lesser of either the total rate of dependency and indemnity compensation (DIC) that would be payable if the veteran had died from a service-connected disability or the rate of disability compensation (minus any authorized insurance deductions) the veteran would have received or been entitled to receive at the time of disappearance. If there is a dependent parent, then the rate for parents' DIC may vary depending on the parent's annual income.

(i) Disability compensation paid at DIC rate. If VA pays disability compensation at the DIC rate pursuant to this paragraph (b), then it will pay benefits to the dependents as if the veteran were deceased.

(ii) Disability compensation paid at veteran's rate. If VA pays disability compensation at the veteran's rate pursuant to this paragraph (b), then it will pay benefits in proportion to the DIC rate for each dependent. VA will use the following steps in calculating each dependent's payment rate:

(A) Determine the DIC rate for each dependent.

(B) Combine those rates together to determine the total rate of DIC that would be payable.

(C) For each dependent, divide the rate in paragraph (b)(1)(ii)(A) of this section by the rate in paragraph (b)(1)(ii)(B) of this section. Calculate the result to four decimal places.

(D) For each dependent, multiply the result from paragraph (b)(1)(ii)(C) of this section by the veteran's rate.

(E) For each dependent, round the final result down to the nearest dollar.

(2) Effective date of payments.—(i) Claim received no later than 1 year after VA last paid the veteran. If VA receives a claim no later than 1 year after the first day of the month after the month for which VA last paid compensation to the veteran, then payments to the veteran's dependent(s) will be payable effective the first day of the month after the month for which VA last paid compensation to the veteran.

(ii) Claim more than 1 year after VA last paid the veteran. If VA receives a claim more than 1 year after the first day of the month after the month for which VA last paid compensation to the veteran, payments to the veteran's dependent(s) will be payable effective the date VA receives the claim.

(c) Veteran receiving or entitled to receive pension. If the veteran was receiving or entitled to receive Section 306 Pension or Improved Pension, VA may pay benefits to the veteran's spouse or child. The veteran's permanent and total disability status, income, and net worth will be presumed to continue unchanged.

(1) Rate payable. The total rate that VA will pay the veteran's dependent(s) is the lesser of the total rate of Improved Death Pension that would be payable if the veteran had died of a non-service-connected disability or the rate of pension the veteran would have received or been entitled to receive at the time of disappearance.

(i) Pension paid at Improved Death Pension rate. If VA pays pension at the Improved Death Pension rate pursuant to this paragraph (c), then it will pay benefits to the dependents as if the veteran were deceased.

(ii) Pension paid at veteran's rate. If VA pays pension at the veteran's rate pursuant to this paragraph (c), then it will pay benefits in proportion to the Improved

Death Pension rate for each dependent. VA will use the following steps in calculating each dependent's payment rate:

(A) Determine the Improved Death Pension rate for each dependent.

(B) Combine those rates together to determine the total rate of Improved Death Pension that would be payable.

(C) For each dependent, divide the rate in paragraph (c)(1)(ii)(A) of this section by the rate in paragraph (c)(1)(ii)(B) of this section. Calculate the result to 4 decimal places.

(D) For each dependent, multiply the result from paragraph (c)(1)(ii)(C) of this section by the veteran's rate.

(E) For each dependent, round the final result down to the nearest dollar.

(2) Effective date of payments.—(i) Claim received no later than 1 year after VA last paid the veteran. If VA receives a claim no later than 1 year after the first day of the month after the month for which VA last paid pension to the veteran, payments to the veteran's dependent(s) will be payable effective the first day of the month after the month for which VA last paid pension to the veteran.

(ii) Claim received more than 1 year after VA last paid the veteran. If VA receives a claim more than 1 year after the first day of the month after the month for which VA last paid pension to the veteran, payments to the veteran's dependent(s) will be payable effective the date VA receives the claim.

(d) Discontinuance of payments to veteran's dependent(s).—(1) Veteran's whereabouts become known. If VA becomes aware of the veteran's whereabouts, VA

will discontinue payments to the veteran's dependent(s) effective the first day of the month after the month for which VA last paid benefits to the veteran's dependent(s).

(2) Veteran presumed dead. VA will discontinue payments to the veteran's dependent(s) if the veteran is presumed dead under § 5.502. The date of the veteran's death is presumed to be 7 years after the date the veteran was last known to be alive. See § 5.694 for the effective date for discontinuance of benefits based on the death of a beneficiary.

(Authority: 38 U.S.C. 1158, 1507)

§ 5.712 Suspension of benefits due to the disappearance of a payee.

(a) Suspension of benefits. When a payee's whereabouts are unknown, VA will suspend payment of pension, disability compensation, dependency and indemnity compensation, the monetary allowance under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects, or other monetary allowances effective the first day of the month after the month for which VA last paid benefits to the payee.

(b) Resumption of suspended benefits. If VA has suspended payment of benefits under paragraph (a) of this section, VA will resume payments if VA becomes aware of the payee's whereabouts. The effective date of payments will be the first day of the first month for which VA suspended payments if entitlement is otherwise established. Retroactive payments to a veteran under this paragraph (b) will be

reduced by the amount of any payments made to the veteran's dependents under § 5.711.

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

§ 5.713 Restriction on benefit payments to an alien located in enemy territory.

(a) Restriction on payment. VA will discontinue all benefits except insurance payments to an alien who is located in the territory of either an enemy of the U.S. or in the territory of an enemy of any ally of the U.S. in territory that is under the military control of either an enemy of the U.S. or an enemy of any ally of the U.S. VA will discontinue benefits to an alien located in territory described in this paragraph (a), effective the first day of the month after the month for which VA last paid benefits.

(b) Apportionment of benefits. VA may apportion to the dependent(s) of an affected alien all or any part of the benefits discontinued under paragraph (a) of this section.

(1) The amount payable to each dependent may not exceed the amount that would be payable to the dependent if the alien had died.

(2) VA will discontinue payments to the dependent(s) effective the date it receives notice that the alien is no longer located in territory described in paragraph (a) of this section.

(3) VA will reduce or discontinue payments to the dependent(s) upon the death of the alien or dependent, upon reduction or discontinuance of the alien's benefits, or when dependent status ends.

CROSS REFERENCE: § 5.715, Claims for undelivered or discontinued benefits.

(Authority: 38 U.S.C. 5112(a), 5308)

§ 5.714 Restriction on delivery of benefit payments to payees located in countries on Treasury Department list.

(a) Definitions. For purposes of this part:

(1) Special deposit account means the "Secretary of the Treasury, Proceeds of Withheld Foreign Checks" account established under 31 U.S.C. 3329(b)(4).

(2) Treasury Department list means the list of countries identified by the Secretary of the Treasury in 31 CFR 211.1, to which checks cannot be delivered with reasonable assurance that the payee will receive the check and be able to negotiate it for full value.

(b) Evidence requests. Unless a claimant or payee who is living in a country on the Treasury Department list requests the alternative means of delivery described in paragraph (d) of this section, VA will not request evidence in support of a claim for benefits if such evidence would be obtained from a country on the Treasury Department list.

(c) Restriction on check delivery. VA will not send benefit checks to a payee located in a country on the Treasury Department list or to a guardian or other person in

the U.S. or a territory or possession of the U.S. who is legally responsible for the care of a payee located in a country on the Treasury Department list.

(d) Alternative delivery permitted. If requested by a payee located in a country on the Treasury Department list, VA will send benefit checks to him or her in care of a U.S. Foreign Service post, specified by the payee, in a country that is not on the Treasury Department list.

(e) Disposition of benefit checks. If the payee does not request the alternative means of delivery described in paragraph (d) of this section, VA will deposit checks described in paragraph (c) of this section into the special deposit account or into the U.S. Treasury as miscellaneous receipts, as required by 31 U.S.C. 3329(b) and 3330(b).

CROSS REFERENCE: § 5.715, Claims for undelivered or discontinued benefits.

(Authority: 31 U.S.C. 3329, 3330)

§ 5.715 Claims for undelivered or discontinued benefits.

(a) Definitions. For the definitions of “special deposit account” and “Treasury Department list”, see § 5.714(a).

(b) Claims for undelivered or discontinued benefits. (1) Unless a payee requests the alternative means of delivery under § 5.714(d), the payee must file a claim with VA in order to be entitled to:

(i) Any amounts not paid because awarded benefits were discontinued under § 5.713;

(ii) Resumption of benefits discontinued under § 5.713; or

(iii) Any undelivered benefit payments deposited to the payee's credit in the special deposit account or into the U.S. Treasury as miscellaneous receipts as described in § 5.714(e).

(2) Undelivered amounts will be released or a discontinued benefit restored retroactively or resumed only if:

(i) For a payee whose benefits were discontinued under § 5.713, the payee is no longer subject to the restriction in § 5.713(a);

(ii) For a payee whose benefit checks were withheld under § 5.714, the payee is no longer subject to the restriction in § 5.714(c); or

(iii) For a payee whose benefit checks were withheld under § 5.714, the payee requests the alternative means of delivery described in § 5.714(d).

(Authority: 31 U.S.C. 3329)

(c) Forfeiture for treasonable acts. Benefits are subject to forfeiture for treasonable acts as provided in § 5.677.

(d) Evidence requests. Subject to § 5.90, VA may request evidence necessary to support a claim under this section. Evidence VA may request includes:

(1) Satisfactory evidence that the payee has not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy; and

(2) Evidence of continued entitlement to benefits during the period that VA discontinued benefits or benefit payments were undelivered.

(Authority: 38 U.S.C. 5308)

(e) Germany and Japan. VA will make no payments for any period before the date of filing a new claim if payments were discontinued before July 1, 1954, because the payee was a citizen or subject of Germany or Japan.

(Authority: 38 U.S.C. 5309)

CROSS REFERENCE: § 5.565, Special rules for payment of benefits on deposit in a special deposit account when a payee living in a foreign country dies.

(Authority: 31 U.S.C. 3330)

§§ 5.716–5.719 [Reserved]

HOSPITAL, DOMICILIARY, AND NURSING HOME CARE

§ 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care

(a) Definitions. For purposes of this section and §§ 5.721 through 5.730:

(1) Hospital care. Except as provided in paragraphs (c)(1) and (f)(1) of this section, hospital care means treatment provided in a VA hospital or provided in any hospital at VA expense.

(2) Domiciliary or nursing home care means treatment provided in a VA domiciliary or nursing home or in any domiciliary or nursing home at VA expense

NOTE TO PARAGRAPHS (a)(1) AND (2): When multiple types of care are referred to consecutively (for example, “hospital, domiciliary, or nursing home care”), VA will consider transfers between the different types of care as a continuous period of all such care. VA will not consider a transfer between different types of care (hospital, domiciliary, or nursing home care) to be a discharge or release under §§ 5.720 through 5.730.

(3) Regular discharge or release means a veteran, surviving spouse, or child is discharged or released at the order of a medical professional based on that professional’s opinion that there is no medical reason to continue care.

(4) Irregular discharge or release means a veteran, surviving spouse, or child is discharged or released for any of the following reasons:

(i) Refusal to accept treatment;

(ii) Neglect of treatment;

(iii) Obstruction of treatment;

(iv) Disciplinary reasons;

(v) Refusal to accept transfer to another facility;

(vi) Leaving the facility against medical advice; or

(vii) Failure to return from unauthorized or authorized absence.

(5) Temporary absence means a veteran, surviving spouse, or child is placed on non-bed care status or authorized absence. A temporary absence is not a discharge or release. When calculating a period of temporary absence, VA includes the day on which the temporary absence begins.

(b) Adjustment of special monthly compensation while receiving hospital, domiciliary, or nursing home care. VA will discontinue special monthly compensation (SMC) payable because a veteran needs regular aid and attendance or a higher level of care if the veteran is admitted to hospital, domiciliary, or nursing home care and the veteran remains in such care on the first day of the second calendar month after the date of admission. In such cases, VA will reduce SMC to a rate specified in paragraph (c) of this section. The effective date of the reduced rate of SMC will be the first day of the second calendar month after the date of admission. However, VA will make no reduction or discontinuance under this paragraph (b) if:

(1) The rate of special monthly compensation payable would be the same with or without an award for regular aid and attendance; or

(2) An exception in paragraph (d) of this section applies.

(c) Calculating reduction of the rate of special monthly compensation. If appropriate under paragraph (b) of this section, VA will reduce a veteran's SMC rate as follows:

(1) Discontinuance of special monthly compensation under § 5.332. VA will discontinue SMC paid under § 5.332. For purposes of this paragraph (c)(1), hospital care means treatment in any hospital, including a private hospital, at U.S. Government expense. The discontinuance required by this paragraph (c)(1) is made only for hospital care; it is not made for domiciliary or nursing home care. VA will also make a reduction under paragraph (c)(3) of this section, if the veteran's circumstances meet any of those criteria.

(2) Reduction of special monthly compensation under §§ 5.324 and 5.331. VA will reduce the following payments to the rate payable under § 5.333:

(i) Special monthly compensation paid at the rate under § 5.324 if entitlement is based on the need for regular aid and attendance.

(ii) Special monthly compensation paid under § 5.331(d)(1) or (e)(1) because a veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and has been awarded the intermediate or next higher rate based on additional disability that is independently ratable.

(3) Reduction of special monthly compensation under § 5.330(e). Special monthly compensation paid at the rate under § 5.330(e), based on the need for regular aid and attendance will be reduced as follows:

(i) If the veteran is entitled to the rate under § 5.324 both for the need for regular aid and attendance and for some other disability or combination of disabilities without

considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.326.

(ii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.326 without considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.328, Special monthly compensation under 38 U.S.C. 1114(n).

(iii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.328 without considering any disabilities twice, then VA will not reduce the SMC rate payable under § 5.330.

(4) Reduction of special monthly compensation under § 5.326(i). VA will reduce SMC paid under § 5.326(i) to the rate payable under § 5.324.

(5) Additional disability compensation based on having dependents. In addition to the rates specified in paragraphs (c)(1) through (4) of this section, VA will pay the additional amount of disability compensation payable to a veteran for dependents if he or she is entitled to disability compensation based on disabilities evaluated at 30 percent or more disabling.

(6) Additional ratings under § 5.323. In addition to the rates specified in paragraphs (c)(1) through (4) of this section, SMC under § 5.323, based on independently ratable disability, is payable subject to the statutory ceiling on the total amount of compensation specified in § 5.323(b).

(d) Exceptions. Except for the discontinuances required by paragraphs (c)(1) and (f)(1) of this section, VA will not reduce or discontinue SMC under this section if the need for regular aid and attendance is caused by disability resulting from:

(1) Loss of use of both lower extremities and loss of anal and bladder sphincter control; or

(2) Hansen's disease.

(e) Readmission after discharge or release.—(1) Regular discharge or release. If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(2) Irregular discharge or release.—(i) Readmission less than 6 months after a period of hospital, domiciliary, or nursing home care. VA will pay a reduced rate of SMC under paragraph (c) of this section effective on the date of readmission if all of the following are true:

(A) SMC is reduced or discontinued under paragraph (b) of this section;

(B) The veteran is given an irregular discharge or release from hospital, domiciliary, or nursing home care; and

(C) The veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after discharge or release.

(ii) Readmission 6 months or more after a period of hospital, domiciliary, or nursing home care. If a veteran described in paragraph (e)(2)(i)(A) and (B) of this section is readmitted to hospital, domiciliary, or nursing home care 6 months or more

after discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(f) Entitlement to special monthly compensation based on the need for regular aid and attendance established while a veteran is receiving hospital, domiciliary, or nursing home care. (1) If a veteran becomes entitled to SMC under § 5.332 while receiving hospital care effective on or after the date of admission into such care, then VA will not pay that benefit until the date of discharge or release from hospital care. This does not affect payments for periods prior to admission. For purposes of this paragraph (f)(1), hospital care means treatment in any hospital, including a private hospital, at U.S. Government expense.

(2) If a veteran becomes entitled to SMC under any other provision of this part based on the need for regular aid and attendance while receiving hospital, domiciliary, or nursing home care effective on or after the date of admission into such care, then VA will pay reduced SMC under paragraphs (c)(2) through (4) of this section unless entitlement is based on one of the exceptions in paragraph (d) of this section. This does not affect payments for periods prior to admission.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) Temporary absence from hospital, domiciliary, or nursing home care.

(1) Temporary absence for 30 days or more. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment reduced or discontinued under § 5.720. The effective date of the resumed payment is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce or discontinue special monthly compensation under § 5.720 effective the date that the veteran returns to such care.

(2) Temporary absence for less than 30 days. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments reduced or discontinued under § 5.720. If the veteran is later discharged or released, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(b) Discharge or release. If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.720 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.722 Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care.

(a) General provisions.—(1) Veterans affected. Except as provided in paragraph (b) or (f) of this section, VA will reduce Improved Pension paid to a veteran who receives domiciliary or nursing home care continuously for 3 calendar months or who receives such care along with hospital care, as provided in paragraph (e)(2) of this section, and who:

(i) Does not have a spouse or child; or

(ii) Is married or has a child but is receiving Improved Pension as a veteran without dependents.

(2) Rate payable. VA will reduce Improved Pension under this section to $90 per month.

(3) Effective date of reduction. Except as provided in paragraph (f) of this section, a reduction under paragraph (a)(1) of this section will be effective on the first day of the fourth calendar month after the month of admission to domiciliary or nursing home care.

(b) Exceptions. VA will not reduce Improved Pension under this section if a veteran is:

(1) Receiving domiciliary or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home;

(3) Receiving domiciliary or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741; or

(4) Receiving pension as a veteran without a dependent because it is reasonable that part of his or her child's net worth be consumed for the child's maintenance before the child can be established as a dependent. See § 5.414(e).

(c) Apportionment of benefits to a spouse. Improved pension in excess of the $90 may be apportioned to the veteran's spouse under § 5.772(c)(2)(ii).

(d) Readmission.—(1) Less than 6 months after prior period of domiciliary or nursing home care. If a veteran is readmitted to domiciliary or nursing home care less than 6 months after a period of domiciliary or nursing home care for which Improved Pension was reduced under this section, VA will reduce Improved Pension to $90 per month effective the first day of the month after the month of readmission.

(2) Six months or more after prior period of domiciliary or nursing home care. If a veteran is readmitted 6 months or more after a period of domiciliary or nursing home care for which Improved Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(e) Transfers.—(1) Transfer from hospital care. If a veteran is receiving hospital care and is transferred to domiciliary or nursing home care, VA will not consider the period of hospital care as domiciliary or nursing home care.

(2) Transfers from domiciliary or nursing home care. (i) If a veteran is transferred from domiciliary or nursing home care to hospital care then back to domiciliary or nursing home care, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(ii) If a veteran is transferred from domiciliary or nursing home care to hospital care and then dies while hospitalized, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(iii) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if a veteran is discharged or released from VA care after his or her hospital stay.

(iv) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if the period of hospital care exceeds 6 months.

(f) Nursing home care for a prescribed program of rehabilitation.—(1) Delay in reduction. The reduction required by this section for a veteran receiving nursing home care will be delayed for up to 3 additional calendar months after the first day of the fourth calendar month referred to in paragraph (a)(3) of this section, or the first day of the month following the month of readmission referred to in paragraph (d)(1) of this section, if the Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's additional period of nursing home care is to provide a

prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(2) Continued nursing home care for rehabilitation. The delay in reduction may be extended beyond the 3-month period provided by paragraph (f)(1) of this section if both of the following are true:

(i) The veteran continues to receive nursing home care; and

(ii) The Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's continued nursing home care is to provide a prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(3) Rehabilitation ends. The veteran's Improved Pension will be reduced under this section effective the first day of the calendar month after the date on which the program of rehabilitation ends.

(g) Entitlement to Improved Pension established while a veteran is receiving domiciliary or nursing home care. If a veteran becomes entitled to Improved Pension while receiving domiciliary or nursing home care, VA will reduce pension, or pay a reduced rate of pension, in accordance with this section.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.723 Adjustment of Improved Pension while a veteran, surviving spouse, or surviving child is receiving Medicaid-covered care in a nursing facility.

(a) General provision. Until November 30, 2016, VA will reduce Improved Pension being paid to a veteran without a spouse or child, to a surviving spouse without a child, or to a surviving child, to $90 per month when that beneficiary is receiving Medicaid-covered care in a nursing facility. VA will not reduce Improved Pension under this section if a veteran is receiving Medicaid-covered care in a State home to which VA makes per diem payments under 38 U.S.C. 1741.

(b) Effective date of reduction. Except as provided in paragraph (c) of this section, the effective date of reduction of Improved Pension payments under this section will be the latest of:

(1) The first day of the month after the month in which Medicaid-covered care begins;

(2) The first day of the month after the month during which the 60-day period prescribed in § 5.83(b) expires; or

(3) The first day of the month after the month for which VA last paid benefits.

(c) Willful concealment. If a beneficiary willfully conceals information that would lead to a reduction of Improved Pension payments under this section, and VA subsequently reduces Improved Pension under this section, the effective date of the reduction will be the first day of the month after the month in which the willful concealment occurred. In such a case, the beneficiary will be liable for any payments in excess of $90 per month made after the effective date of the reduction if the willful concealment prevented VA from reducing benefits during that period.

(d) Entitlement to Improved Pension established while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility. If a veteran, surviving spouse, or child described in paragraph (a) of this section becomes entitled to Improved Pension while receiving Medicaid-covered care in a nursing facility, then VA will not pay more than $90 per month while he or she receives such care.

(Authority: 38 U.S.C. 5503(d))

§ 5.724 Adjustment or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) Reduction or discontinuance of Improved Pension. (1) If a veteran who is receiving Improved Pension based on the rate for regular aid and attendance receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will pay Improved Pension based on the housebound rate.

(2) The resulting reduction or discontinuance of Improved Pension will be effective the first day of the second calendar month after the date of admission.

(3) VA will not reduce or discontinue Improved Pension under this paragraph (a) if an exception in paragraph (b) of this section applies.

CROSS REFERENCE: §§ 5.400(b) and (c) for the housebound and regular aid and attendance rates; 5.722 for reductions of Improved Pension after 3 calendar months of domiciliary or nursing home care.

(b) Exceptions. VA will not reduce or discontinue Improved Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) Blindness pursuant to § 5.390(b)(1) or (2); or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) Readmission after discharge or release.—(1) Regular discharge or release. If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(2) Irregular discharge or release. (i) If a veteran whose Improved Pension was reduced or discontinued under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or release, then VA will pay Improved Pension based on the housebound rate effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the

readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(d) Entitlement to Improved Pension based on the need for regular aid and attendance established while a veteran is admitted to hospital, domiciliary, or nursing home care. If a veteran who is admitted to hospital, domiciliary, or nursing home care becomes entitled to Improved Pension based on the need for regular aid and attendance, with an effective date on or after the date of admission, then VA will pay Improved Pension based on the housebound rate. VA will not reduce or discontinue benefits under this paragraph (d) if an exception in paragraph (b) of this section applies.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.—(1) Improved Pension based on the need for regular aid and attendance. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment discontinued under § 5.724. The effective date of the resumed payment is the date the temporary absence began. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will

discontinue Improved Pension based on the need for regular aid and attendance under § 5.724 effective the date that the temporary absence ends.

(2) Improved Pension.—(i) General. If a beneficiary is on temporary absence from any domiciliary or nursing home care facility, or a Medicaid-covered nursing facility, for 30 days or more, VA will resume any payment reduced under § 5.722 or § 5.723. The payment will be resumed at the rate that is appropriate based on the beneficiary's income. The effective date of the resumed payment is the date that the temporary absence began. If the beneficiary returns to such facility, then VA will reduce Improved Pension under § 5.722 or § 5.723 effective the date that the temporary absence ends.

(ii) Apportionment of benefits to a spouse. If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence began, unless it is determined that the apportionment will continue under § 5.771.

(b) Temporary absence for less than 30 days.—(1) Improved Pension based on the need for regular aid and attendance. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments discontinued under § 5.724. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(2) Improved Pension. If a beneficiary is on temporary absence from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, for less than 30 consecutive days, VA will not resume any payments reduced under § 5.722 or § 5.723. If the beneficiary is later discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) Discharge or release.—(1) Improved Pension based on the need for regular aid and attendance. If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.724 effective the date the veteran is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on such care unless the evidence of record shows that a different rate is required.

(2) Improved Pension. If a beneficiary is discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will resume any payment reduced under § 5.722 or § 5.723 effective the date the beneficiary is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on domiciliary care, nursing home care, or Medicaid-covered nursing facility care, unless the evidence of record shows that a different rate is required.

(3) Apportionment of benefits to a spouse. If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from domiciliary or nursing home

care, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(Authority: 38 U.S.C. 5503)

§ 5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) General provisions.—(1) Veterans affected. Except as provided in paragraph (b) of this section, VA will reduce Section 306 Pension paid to a veteran who receives hospital, domiciliary, or nursing home care continuously for 2 calendar months and who:

(i) Does not have a spouse or child; or

(ii) Is married or has a child, but is receiving Section 306 Pension as a veteran without dependents.

(2) Proof of dependents. If VA requests evidence about a spouse or child but such evidence is not received before the effective date of the reduction, then VA will reduce the veteran's Section 306 Pension under this section on the basis of no dependents. If the evidence is received within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) Rate payable. VA will reduce Section 306 Pension under this section to $50 per month.

(4) Effective date of reduction. A reduction under paragraph (a) of this section will be effective on the first day of the third calendar month after the month of admission to hospital, domiciliary, or nursing home care.

(5) Calculation of period. For purposes of calculating continuous periods of hospital, domiciliary, or nursing home care under this section, authorized absences for periods of 96 hours or less will be included as periods of hospital, domiciliary, or nursing home care. For authorized absences for periods of more than 96 hours, the entire period will be excluded from the total number of days, but will not be considered a break in the continuous period of hospital, domiciliary, or nursing home care. Sixty total days of hospital, domiciliary, or nursing home care will be considered 2 calendar months of such care.

(b) Exceptions. VA will not reduce Section 306 Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) Apportionment of benefits to a spouse. Benefits in excess of the $50 per month may be apportioned to the veteran’s spouse under § 5.772(c)(2)(i).

(d) Readmission.—(1) Less than 6 months after admission. If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, VA will reduce Section 306 Pension effective the first day of the month after the month of readmission.

(2) Six months or more after admission. If a veteran is readmitted 6 months or more after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 5503; Pub. L. 95-588, § 306, 92 Stat. 2497)

§ 5.727 Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) General provisions.—(1) Veterans affected. Except as provided in paragraph (b) of this section, VA will reduce Old-Law Pension being paid to a veteran who has received hospital, domiciliary, or nursing home care continuously for 6 calendar months and who does not have a spouse or child.

(2) Proof of dependents. If VA requests evidence about a spouse or child but such evidence is not received within 60 days, then VA will reduce the veteran's Old-Law Pension under this section on the basis of no dependents. If the evidence is received within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) Rate payable. VA will reduce Old-Law Pension under this section to either $30 per month or 50 percent of the amount of Old-Law Pension otherwise payable to the veteran, whichever amount is greater.

(4) Effective date of reduction.—(i) General. The effective date of reduction under paragraph (a) of this section is the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care. VA excludes any month (others than the month of admission) that contains an authorized absence from its calculation of the effective date.

(ii) Effect of irregular discharge prior to reduction. The reduction will be effective on that date even if a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care and is readmitted to such care before that effective date. If the veteran is readmitted after the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(b) Exceptions. VA will not reduce Old-Law Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) Readmission.—(1) Readmission after regular discharge or release. If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section unless the veteran was discharged or released for purposes of admission to another facility for hospital, domiciliary, or nursing home care.

(2) Readmission after irregular discharge or release.—(i) Less than 6 months after discharge or release. If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, VA will reduce Old-Law Pension effective the first day of the month after the month of readmission.

(ii) Six months or more after discharge or release. If a veteran is readmitted 6 months or more after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: Pub. L. 95-588, § 306, 92 Stat. 2497)

§ 5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) Reduction of Old-Law Pension or Section 306 Pension. (1)(i) Old-Law Pension. If a veteran who is receiving Old-Law Pension at the regular aid and attendance rate ($135.45 monthly) receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will reduce benefits to the housebound rate ($100 monthly).

(ii) Section 306 Pension.—(A) General. If a veteran who is receiving Section 306 Pension based on the regular aid and attendance rate receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will pay benefits based on the housebound rate. VA will reduce benefits by $104 per month, which is the difference between the aid and attendance allowance ($165) and the housebound allowance ($61).

(B) Reduced aid and attendance allowance. If a veteran who is receiving Section 306 Pension at a reduced regular aid and attendance rate (under former 38 U.S.C. 521(d)(2), as in effect on December 31, 1978) receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will reduce benefits to $61 per month.

(2) The resulting reduction of these benefits will be effective the first day of the second calendar month after the month of admission.

(3) VA will not reduce benefits under this paragraph (a) if an exception in paragraph (b) of this section applies.

CROSS REFERENCE: § 5.471 for the housebound and regular aid and attendance rates.

(b) Exceptions. VA will not reduce Old-Law Pension or Section 306 Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) 5/200 visual acuity or less in both eyes with corrective lenses or due to concentric contraction of the visual field to 5 degrees or less in both eyes; or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) Readmission after discharge or release.—(1) Regular discharge or release. If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(2) Irregular discharge or release. (i) If a veteran whose Old-Law Pension or Section 306 Pension was reduced under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or

release, then VA will reduce Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 501(a); Pub. L. 95-588, § 306, 92 Stat. 2497)

§ 5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care.

(a) Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.—(1) General. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728. The effective date of the resumed payment is the date that the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Section 306 Pension effective the date that the temporary absence ends.

(2) Apportionment of benefits to a spouse. If benefits reduced under § 5.726 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence begins, unless it is determined that the apportionment will continue under § 5.771.

(b) Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days. Except as provided in paragraph (c) of this section, if a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Section 306 Pension payments reduced under § 5.726 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) Adjustment based on need. (1) If a veteran has been under hospital, domiciliary, or nursing home care for more than 6 months and the combined periods of absence from such care exceed a total of 30 days, VA will retroactively pay the amounts that were unpaid under § 5.726 during such temporary absences if:

(i) The director of the facility providing hospital, domiciliary, or nursing home care requests payment on behalf of a veteran; and

(ii) Payment is necessary to meet the veteran's financial needs.

(2) If the conditions in paragraph (c)(1) of this section are met, payment will be restored even if the veteran has not been discharged or released from hospital, domiciliary, or nursing home care.

(d) Discharge or release.—(1) General. If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728 effective the date the veteran was

discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(2) Apportionment of benefits to a spouse. If benefits reduced under § 5.726 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from hospital, domiciliary, or nursing home care, unless it is determined that the apportionment will continue under § 5.771.

(Authority: 38 U.S.C. 5503; Pub. L. 95-588, § 306, 92 Stat. 2497)

§ 5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728. The effective date of the resumed payment for Old-Law Pension reduced under § 5.727 is the date of reduction. The effective date of the resumed payment for Old-Law Pension reduced under § 5.728 is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Old-Law Pension effective the date that the temporary absence ends.

(b) Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Old-Law Pension payments reduced under § 5.727 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) Regular discharge or release. If a veteran is regularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date that the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. VA will also pay any amounts that were unpaid during the veteran's hospital, domiciliary, or nursing home care.

(d) Irregular discharge or release. If a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. If a veteran's irregular discharge or release is not changed to a regular discharge or release, VA will not pay any Old-Law

Pension that was unpaid during the veteran's hospital, domiciliary, or nursing home care until 6 months after the date the veteran was discharged or released.

(Authority: Pub. L. 95-588, § 306, 92 Stat. 2497)

5.731–5.739 [Reserved]

PAYMENTS TO A BENEFICIARY WHO IS ELIGIBLE FOR MORE THAN ONE BENEFIT: GENERAL PROVISIONS

§ 5.740 Definitions relating to elections of benefits.

(a) Election means any writing expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled.

(b) Initial election means the first election a person makes between two or more benefits.

(c) Reelection means an election a person makes between benefits that were the subject of an initial election.

(d) Timely filed with respect to elections means that an election is filed no later than 1 year after VA's notice that such an election is required, except as provided in §§ 5.745(d)(1), 5.750(a)(2), 5.757(a) through (c), and 5.759(b).

(Authority: 38 U.S.C. 501(a), 5103(b))

CROSS REFERENCE: § 5.535, Adjustments to a parent's dependency and indemnity compensation when income changes.

§ 5.741 Persons who may make an election of benefits.

(a) General rule. VA will accept an election signed by a claimant or beneficiary, or if applicable, by any one of the following persons acting on behalf of a claimant or beneficiary:

(1) The spouse of a claimant or beneficiary if the claimant or beneficiary has been declared to be an incompetent veteran under § 13.57 of this chapter;

(2) The custodian of a claimant or beneficiary if the claimant or beneficiary is a minor under § 13.58 of this chapter;

(3) A fiduciary designated by VA under § 13.55 of this chapter;

(4) A court-appointed fiduciary, under § 13.59 of this chapter; or

(5) The chief officer of the health-care institution in which the veteran is receiving care and treatment, and whom VA has designated as a payee, under §§ 13.55(b)(6) and 13.61 of this chapter.

(b) Elections from a Member of Congress or duly authorized representative. This paragraph (b) applies if VA receives a communication from a Member of Congress or from a claimant or beneficiary's duly authorized representative indicating that a claimant or beneficiary wishes to elect a VA benefit. (If the communication is from a service organization, attorney, or agent, there must be a power of attorney in effect at the time the communication was written.) If VA receives such a communication, VA will provide notice to the claimant or beneficiary that a person listed in paragraph (a) of this section must sign such an election. If a properly signed election is then timely filed under § 5.740(d), VA will consider the properly signed election to have been filed on the date it received the communication from the Member of Congress or the duly authorized representative.

(Authority: 38 U.S.C. 501(a), 5103(b)(1))

§ 5.742 Finality of elections of benefits; cancellation of certain elections of benefits.

This section explains when an election or reelection becomes final. A final election or reelection ordinarily may be changed only by cancellation under paragraph (d) or (e) of this section or by reelection, if authorized under this part. Reelections are subject to the finality rules stated in paragraphs (a) through (e) of this section.

(a) Finality of an election when benefits are received by check. Except as otherwise provided in this section, if the beneficiary receives payment of the elected benefit by check, the election is final when the beneficiary (or a person authorized to act

on the beneficiary's behalf under § 5.741) negotiates the first check for the elected benefit.

(b) Finality of an election when benefits are received by direct deposit or electronic funds transfer. Except as otherwise provided in this section, if the beneficiary receives payment of the elected benefit by direct deposit or electronic funds transfer, the election is final when the applicable financial institution receives the second payment of the elected benefit.

(c) Finality of an election when a beneficiary dies after filing an election. If a beneficiary died after filing an election, but before the beneficiary had negotiated the check or before the applicable financial institution had received the second payment for the elected benefit, the election is final even though it would not be considered final under paragraph (a) or (b) of this section.

(d) Cancellation of an election made by an incompetent person. If VA finds that a beneficiary was mentally incompetent when he or she elected a benefit, the beneficiary, or another person listed in § 5.741(a), who is acting on behalf of the beneficiary, may cancel that election. There is no deadline to cancel an election under this paragraph (d).

(e) Cancellation of elections that were based on erroneous VA information. A beneficiary may cancel an election that was based on erroneous information provided

by VA. For this right to cancellation to apply, VA must make a determination that it previously provided erroneous information. This determination must be based on the same evidence that VA used when it previously provided the erroneous information. There is no deadline to cancel an election under this paragraph (e).

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

§ 5.743 General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.

(a) General effective date of award; offset—(1) Effective date of award. Unless otherwise provided in this part, the effective date of an award of an elected benefit will be the same as the effective date VA would assign for the awarded benefit if no election were required. Unless otherwise provided in this part, if a beneficiary elects a different benefit, the effective date of an award of the elected VA benefit is the date VA receives the election.

(2) Offset. Payments of the elected benefit are subject to an offset. The payments will be offset by any payments the beneficiary received for another benefit for the same period. This offset will occur only if the two benefits cannot be received concurrently.

(Authority: 38 U.S.C. 5110, 5304)

(b) Effective date of reduction or discontinuance. Unless otherwise provided in

this part, VA will reduce or discontinue payments of a benefit because the beneficiary elected a different VA benefit or a non-VA benefit, effective on the effective date of the other benefit.

(Authority: 38 U.S.C. 5112, 5304)

§ 5.744 [Reserved]

PAYMENTS FROM SERVICE DEPARTMENTS AND THE EFFECTS OF THOSE PAYMENTS ON VA BENEFITS

§ 5.745 Entitlement to concurrent receipt of military retired pay and VA disability compensation.

(a) Definition of "military retired pay". For purposes of this part, "military retired pay" is payment received by a veteran that is classified as retired pay by the Service Department, including, but not limited to retainer pay, based on the recipient's service as a member of the Armed Forces or as a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration (including its predecessor agencies, the Coast and Geodetic Survey and the Environmental Science Services Administration).

(b) Payment of both military retired pay and disability compensation or Improved Pension—(1) Disability compensation. Subject to paragraphs (b)(2) and (3) of this section, a veteran who is entitled to military retired pay and disability compensation for a service-connected disability rated 50 percent or more disabling, or a combination of service-connected disabilities rated 50 percent or more disabling, under the Schedule for Rating Disabilities in part 4, subpart B of this chapter, is entitled to receive both payments subject to the phase-in period described in paragraph (c) of this section.

(2) Chapter 61 disability retirees retiring with 20 or more years of service. Disability retired pay payable under 10 U.S.C. Chapter 61 to a veteran with 20 or more years of creditable service may be paid concurrently with disability compensation to a qualifying veteran subject to the following elements:

(i) Any waiver required during the phase-in period under paragraph (c)(1)(ii) of this section; and

(ii) If the veteran's disability retired pay exceeds the amount of retired pay the veteran would have received had the veteran retired based on length of service, the veteran must waive that excess amount of disability retired pay in order to receive VA disability compensation.

(3) Chapter 61 disability retirees retiring with less than 20 years of service. A veteran who receives disability retired pay under 10 U.S.C. Chapter 61 with less than 20 years of creditable service is not eligible for concurrent receipt.

(4) Improved Pension. A veteran may receive Improved Pension and military retired pay at the same time without having to waive military retired pay. However, in

determining entitlement to Improved Pension, VA will treat military retired pay in the same manner as countable income from other sources.

(Authority: 10 U.S.C. 1414)

(c) Waiver—(1) When a waiver is necessary. (i) A waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation but is not eligible under paragraphs (b)(1) or (2) of this section to receive both benefits at the same time.

(ii) Except as provided in paragraph (c)(2) of this section, a veteran who is eligible to receive both military retired pay and disability compensation at the same time under paragraphs (b)(1) or (2) of this section must file a waiver in order to receive the maximum allowable amount of disability compensation during the phase-in period. The phase-in period ends on December 31, 2013. After the phase-in period, a veteran retired under 10 U.S.C. chapter 61 who is eligible for concurrent receipt must still file a waiver under the circumstances described in paragraph (b)(2)(ii) of this section.

(2) When a waiver is not necessary. Unless paragraph (b)(2)(ii) of this section applies, a veteran who is entitled to receive disability compensation at the 100 percent rate does not need to file a waiver of military retired pay. The phase-in period does not apply to this group of veterans. This includes a veteran who is entitled to receive disability compensation based on a VA determination of individual unemployability (IU) as well as a veteran rated 100 percent disabled under the Schedule for Rating Disabilities in part 4 of this chapter.

(3) How to file a waiver of military retired pay. A veteran may request a waiver of military retired pay in any written, signed statement, including, but not limited to, a VA form, which reflects a desire to waive all or some military retired pay. The statement must be filed with VA or with the Federal agency that pays the veteran's military retired pay. VA will treat a claim for VA disability compensation filed by a veteran who is entitled to military retired pay as a waiver.

(Authority: 10 U.S.C. 1414; 38 U.S.C. 5305)

(d) Elections and the right to reelect either benefit. (1) A veteran who has filed a waiver of military retired pay under this section has elected to receive disability compensation. A veteran may reelect between benefits covered by this section at any time by filing a written, signed statement to VA or to the Federal agency that pays the veteran's military retired pay.

(2) An election between military retired pay and disability compensation under this section that is filed no later than 1 year after the date of notification of VA entitlement will be considered "timely filed" for effective date purposes. If the veteran is incompetent, the 1-year period will begin on the date that 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 its effect.

(e) Effective date rules for elections under this section. (1) If an election is timely filed under paragraph (d)(2) of this section, the effective date of the election will be the date of entitlement to the elected benefit.

(2) If a waiver is properly filed under paragraph (c) of this section, the effective date of the waiver will be the day following discontinuance or reduction of retired pay.

(3) If a reelection is made under paragraph (d)(1) of this section, the effective date of the election will be the date that the reelection is received by VA.

(Authority: 38 U.S.C. 5304(a), 5305)

§ 5.746 Prohibition against receipt of active military service pay and VA benefits for the same period.

(a) Definition of "active military service pay". For purposes of this section, active military service pay means pay that a veteran receives for active duty, active duty for training, or inactive duty training. Active military service pay does not include pay for time spent by a member of the Reserve Officer Training Corps in drills as part of his or her activities as a member of the corps.

(b) Prohibition against receipt of VA benefits at the same time as active military service pay. VA will not pay VA disability compensation or pension to a veteran for any period for which the veteran receives active military service pay.

(c) Effective date of discontinuance of payments for VA benefits during active duty status. Unless the veteran elects to receive VA benefits instead of active military service pay, VA will discontinue payments effective the day the veteran begins active duty service. If VA does not know the exact date of the veteran's return to active duty, VA will discontinue payments effective the first day of the month after the month for which it last paid benefits. If the exact date of the veteran's return to active duty thereafter becomes known, VA will then discontinue payments effective as of that date.

(d) Resumption of payments for VA benefits on release from active duty.—(1) Effective date. If otherwise in order, VA will resume payments effective the day after the date of release from active duty if VA receives a claim to resume payments no later than 1 year after the date of release. Otherwise, the effective date is 1 year before the date VA receives the claim to resume payments.

(2) Rate—(i) Static service-connected disabilities. If the evidence of record shows that the level of disability had become static at the time of entry into active duty, VA will resume payments for a service-connected disability at the same disability level that was in effect immediately before entering active duty.

(ii) Non-static service-connected disabilities. Except as provided in paragraph (d)(2)(i) of this section, VA will resume payments based on the degree of disability found to exist when the award is resumed. VA will ascertain the degree of disability by considering all the facts, including, but not limited to, facts provided in records from the service department relating to the most recent period of active military service.

(3) Application of § 5.693. Resumptions under paragraph (d) of this section are not subject to § 5.693, except to the extent that the disability rating is increased.

(4) Prior service-connection awards. In determining whether disability compensation payments should be resumed under paragraph (d) of this section, VA will not disturb prior determinations of service connection except as provided in § 5.83(a), or § 5.177.

(5) New claims for service connection. If the veteran incurs or aggravates a disability during the subsequent period of service, VA will not grant service connection for the new disability unless it receives a claim for service connection for that disability.

(e) Waiver of VA benefits during active duty for training or inactive duty for training—(1) Waiver of VA benefits. A veteran who is a Reservist and a National Guard member may waive his or her VA pension or disability compensation for periods of active duty for training or inactive duty for training. See § 5.23. Waivers may cover anticipated periods of training; however, each waiver is effective for not more than 1 year.

(2) Readjustments. VA may authorize retroactive payments of previously waived VA pension or disability compensation if readjustment is in order because the veteran did not receive service pay for a period of training duty as anticipated. However, VA must receive a claim for readjustment no later than 1 year after the end of the fiscal year during which VA benefits were waived.

(Authority: 10 U.S.C. 12316; 38 U.S.C. 501(a), 5304(c))

CROSS REFERENCE: § 5.1, for the definition of “reservist”.

§ 5.747 Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.

(a) Lump-sum readjustment pay. This paragraph (a) applies when entitlement to disability compensation was established after September 14, 1981.

(1) Recoupment of lump-sum readjustment pay. A veteran who has received a lump-sum readjustment payment may also receive disability compensation for disability incurred in, or aggravated by, service before the date of receipt of the lump-sum readjustment payment. However, the lump-sum readjustment payment will be recouped from the disability compensation.

(2) Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment. The veteran must receive the full amount of the monthly disability compensation including additional amounts for a dependent, payable for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the readjustment pay was based.

(Authority: 10 U.S.C. 1174(h)(2); 38 U.S.C. 501(a))

(b) Disability severance pay—(1) Recoupment of disability severance pay when VA disability compensation is awarded for a severance disability. When VA disability compensation is awarded based on the same disability or disabilities for which the

veteran received disability severance pay, VA will recoup from the disability compensation award the full amount of the disability severance pay.

(2) Rate of recoupment of disability severance pay. Generally, VA will recoup disability severance pay from VA disability compensation at the rate payable for the initial determination of the degree of the disability for which the veteran was awarded disability severance pay. However, the veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, payable for any additional nonseverance pay disabilities.

(i) Initial determination of the degree of disability. The initial determination of the degree of disability means the first regular schedular compensable rating determined under the Schedule for Rating Disabilities in part 4 of this chapter. The initial determination of the degree of disability must be made without consideration in whole or in part of a need for hospitalization or a period of convalescence. It does not include a temporary 100 percent rating assigned under § 4.28, § 4.29, or § 4.30 of this chapter.

(ii) Rate of recoupment before an initial determination of the degree of disability. When a veteran is receiving a temporary rating assigned under § 4.28, § 4.29, or § 4.30 of this chapter and VA has not yet made an initial determination of the degree of disability, VA will recoup at the rate payable, based on that temporary rating, for the disability or disabilities for which the severance pay was granted.

(iii) Rate of recoupment after an initial determination of the degree of disability. After making an initial determination of the degree of disability, VA will recoup disability compensation at the monthly rate payable for the degree of disability assigned. VA will

not thereafter change the rate of recoupment based on reevaluations of the veteran's disability that lead to an increased rating.

(3) Disability severance pay for a combat zone veteran. The veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, if the veteran separated under 10 U.S.C. 61 after January 28, 2008, and the veteran's disabilities were incurred:

(i) In the line of duty in a combat zone; or

(ii) During performance of duty in combat-related operations as designated by the Department of Defense.

(Authority: 10 U.S.C. 1174(h) and 1212(d); 38 U.S.C. 501(a), 1161)

(c) Separation pay and special separation benefits. This paragraph (c) applies when entitlement to disability compensation was established after September 14, 1981.

(1) Recoupment of separation pay and special separation benefits. A veteran who has received separation pay or special separation benefits may also receive disability compensation for a disability incurred in or aggravated by service before the date of receipt of separation pay or special separation benefits. However, the separation pay or special separation benefits will be recouped from the disability compensation.

(2) Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment. The veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, payable

for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the separation pay or special separation benefits were based.

(Authority: 10 U.S.C. 1174, 1174a, 38 U.S.C. 501(a))

(d) Amount recouped—(1) Lump-sum readjustment pay, disability severance pay, and separation pay—(i) Payments received before October 1, 1996. VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received before October 1, 1996, regardless of the amount of Federal income tax withheld from such payments.

(ii) Payments received after September 30, 1996. VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received after September 30, 1996, less the amount of Federal income tax withheld from such payments. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(2) Special separation benefits. VA will recoup from VA disability compensation the total amount of special separation benefits under 10 U.S.C. 1174(a) less the amount of Federal income tax withheld from such payments. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(Authority: 10 U.S.C. 1174,1212(d), 38 U.S.C. 501(a))

§ 5.748 Concurrent receipt of VA disability compensation and retired pay by certain officers of the Public Health Service.

Disability compensation may be paid concurrently with retired 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 reasons unrelated to disability before such date;

(b) An officer who incurred a disability before July 29, 1945, but retired unrelated to disability between July 4, 1952, and December 31, 1956; or

(c) An officer who incurred a disability between July 29, 1945, and July 3, 1952, but retired unrelated to disability between July 4, 1952, and December 31, 1956.

(Authority: Sec. 501(b), Pub. L. 84-881, 70 Stat. 881; E.O. 9575, 10 FR 7895, June 29, 1945; E.O. 10349, 17 FR 3769, Apr. 29, 1952)

§ 5.749 [Reserved]

PAYMENTS FROM OTHER FEDERAL AGENCIES AND THE EFFECTS OF THOSE PAYMENTS ON VA BENEFITS FOR A VETERAN AND SURVIVOR

§ 5.750 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.

(a) General rules—(1) Election required. A person who is entitled to compensation from the U.S. Department of Labor's Office of Workers' Compensation Programs under the Federal Employees' Compensation Act (FECA) for a disability or death incurred before January 1, 1957, due to service in the Armed Forces, and who is also entitled to VA pension, disability compensation, or dependency and indemnity compensation (DIC) based on the same disability or death (including compensation or DIC payable under 38 U.S.C. 1151, Benefits for persons disabled by treatment or vocational rehabilitation) must elect whether to receive FECA compensation or the applicable VA benefit. An election under this paragraph (a)(1) is irrevocable once it becomes final under § 5.742. There is no right of reelection, with the exception of the situation addressed in paragraph (a)(2) of this section. If a beneficiary elects to receive FECA compensation, his or her VA benefits will be discontinued effective the end of the month following the month in which VA receives notice of the election from the Office of Workers' Compensation.

(2) Right to reelect dependency and indemnity compensation in lieu of compensation under FECA at any time. A person who is receiving benefits under FECA based on death in military service may reelect at any time to receive DIC in lieu of FECA compensation. However, such an election of DIC is irrevocable once the reelection becomes final under § 5.742.

(3) Future increases in impairment. If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased disability compensation based on the increased impairment will be considered a new benefit and the veteran may elect to receive FECA compensation or VA disability compensation as to that increased impairment. If the veteran elects VA disability compensation for the increase, VA will pay only the difference between the rate payable for the increased rating and the rate payable for the prior rating.

(b) Effect of a surviving spouse's election of compensation under FECA or VA benefits on the rights of a child—(1) Cases in which a spouse's entitlement controls a child's entitlement. If a child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of the veteran's child, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) Cases in which a child has independent entitlement. If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a), 1316(b), 1317(a))

CROSS REFERENCE: § 5.1, for the definition of “custody of a child”.

§ 5.751 Election between VA benefits and compensation under the Federal Employees’ Compensation Act for death or disability due to Federal civilian employment.

(a) When both VA benefits and compensation under the Federal Employees’ Compensation Act (FECA) are based upon the same disability or death—(1) Election required. Except as otherwise provided in this section, a person who is entitled to compensation from the U.S. Department of Labor’s Office of Workers’ Compensation Programs under FECA, for a disability or death due to Federal civilian employment, and who is also entitled to VA disability compensation or dependency and indemnity compensation (DIC) based on the same disability or death, must elect whether to receive FECA compensation or the applicable VA benefit. If a beneficiary elects to receive FECA compensation, his or her VA benefits will be discontinued effective the end of the month following the month in which VA receives notice of the election from the Office of Workers’ Compensation.

(2) No election is required for VA awards approved before September 13, 1960. Any award approved before September 13, 1960, authorizing VA benefits concurrently with an award of FECA compensation for a disability or death due to Federal civilian employment is not subject to the election requirement in paragraph (a)(1) of this section.

(b) When VA benefits and FECA compensation are each based on a different disability or death. There is no prohibition against concurrent payment of FECA compensation and VA disability compensation or DIC if entitlement to each benefit is based on a different disability or death. The election described in paragraph (a)(1) of this section is not required in such cases.

(c) Election is irrevocable. An election to receive FECA compensation or VA benefits under this section is irrevocable once the election becomes final under § 5.742, Finality of elections; cancellation of certain elections. There is no right of reelection.

(d) Future increases in disability. If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased disability compensation based on the increased disability will be considered a new benefit and the veteran may elect to receive FECA compensation or VA disability compensation as to that increased disability.

(e) Effect of a surviving spouse's election of compensation under FECA or VA benefits on the rights of a child—(1) Cases in which a spouse's entitlement controls a child's entitlement. If a child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of the veteran's child, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to

receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) Cases in which a child has independent entitlement. If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a))

§ 5.752 Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.

(a) Procedures before VA receipt of an election between compensation under the Federal Employees' Compensation Act (FECA) and VA benefits. When there is evidence showing that a claimant is receiving benefits from the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP) under FECA for the same disability or death for which VA benefits are claimed, VA will:

(1) Advise OWCP of the pertinent facts in the case, including the disabilities for which VA benefits are payable, and request that OWCP obtain the election; and

(2) Deny the VA claim, advise the claimant of the facts VA furnished to OWCP, and inform the claimant that OWCP will contact the claimant concerning rights of election.

(b) Procedures when there is an election of VA benefits instead of compensation under FECA. If OWCP informs VA that the claimant has elected VA benefits, VA will pay benefits effective the date of receipt of the claim for VA benefits (or other effective date assigned under this chapter based on such claim). VA will offset FECA payments made during the period between the effective date of the VA award and the date of election.

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

§ 5.753 Payment of VA benefits and civil service retirement benefits for the same period.

VA will pay VA benefits to an eligible claimant or beneficiary at the same time that the claimant or beneficiary is receiving civil service retirement benefits. However, VA will consider payments of civil service retirement benefits as income where income is a factor in entitlement to VA benefits except as otherwise provided in this part.

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

§ 5.754 Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.

(a) Disability compensation.—(1) Receipt of payment under Radiation Exposure Compensation Act of 1990. A radiation-exposed veteran, as defined in § 5.268(a), who receives a payment under the Radiation Exposure Compensation Act of 1990, as

amended (42 U.S.C. 2210 note) (RECA), will not be denied disability compensation to which the veteran is entitled under § 5.268 (discussing presumptive service connection for radiation exposed veterans) for months beginning after March 26, 2002.

(2) Non-radiation exposed veteran. A veteran who is not a "radiation-exposed veteran," as defined in § 5.268(a), is not entitled to VA disability compensation for disability caused by a disease that is attributable to exposure to radiation for which the veteran has received a payment under RECA.

(Authority: 38 U.S.C. 1112(c)(4))

(b) Dependency and indemnity compensation (DIC). A person who receives a payment under RECA based upon a veteran's death will not be denied DIC to which the person is entitled under §§ 5.510 through 5.512 and 5.520 through 5.522 for months beginning after March 26, 2002.

(Authority: 38 U.S.C. 1310(c))

(c) Offset of RECA against VA benefits. Notwithstanding paragraphs (a)(1) or (b) of this section, the amount of a RECA payment will be deducted from the amount of disability compensation payable pursuant to § 5.268.

(Authority: 38 U.S.C. 1310(c))

(d) Effective date of discontinuance of VA benefits. This paragraph (d) applies when VA must discontinue VA disability compensation to a person because that person received RECA compensation. In such a case, VA will discontinue its benefits effective the first day of the month that RECA benefits are issued.

(Authority: 42 U.S.C. 2210 note)

§ 5.755 [Reserved]

RULES CONCERNING THE RECEIPT OF MULTIPLE VA BENEFITS

§ 5.756 Prohibition against concurrent receipt of certain VA benefits based on the service of the same veteran.

(a) Veteran. VA may not pay a veteran an award of disability compensation and an award of disability pension at the same time based on the veteran's service.

(b) Survivor. VA may not pay a survivor more than one award of death pension, death compensation, or dependency and indemnity compensation (DIC) based on the service of the same veteran.

(Authority: 38 U.S.C. 5304(a)(1))

§ 5.757 Elections between VA disability compensation and VA pension.

(a) Elections between disability compensation and Improved Pension. A person who is entitled to receive both disability compensation and Improved Pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(b) Elections between dependency and indemnity compensation and death pension. A person who is entitled to receive both dependency and indemnity compensation and death pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(c) Elections between disability compensation and Old-Law Pension or Section 306 Pension. A person who is entitled to receive both disability compensation and Old-Law Pension or Section 306 Pension may elect at any time to receive either benefit. Such person may reelect at any time to receive the other benefit unless otherwise provided in this part, regardless of which is the greater or lesser benefit.

(d) Effect of a veteran's election of disability compensation or pension on other beneficiaries. A veteran's election of disability compensation or pension under this section controls the right of any dependent in that case, even though the election results in the reduction of the benefit payable to the dependent.

(e) Effect of a surviving spouse's election on the rights of a child—(1) General rule: the election of the surviving spouse controls the claims of the child. An election by a surviving spouse controls the claims of a child including a child over age 18 and any child not in the custody of the surviving spouse, even though the election results in the reduction of the benefit payable to a child.

(2) Exception: when a surviving spouse elects death compensation. When a surviving spouse elects death compensation instead of Improved Death Pension, an otherwise eligible child is not precluded from receiving Improved Death Pension if the child is not in the custody of a surviving spouse. See § 5.417.

(3) Exception: when a surviving spouse elects Improved Death Pension. A surviving spouse's election of Improved Death Pension does not affect the benefits of a surviving child who was receiving a separate apportioned award of Old-Law Pension or Section 306 Pension on December 31, 1978.

(f) Change from one law to another.—(1) General. Except as otherwise provided, where payments of pension or disability 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 disability compensation becomes payable under the other law, benefits at the higher rate will not be paid for any date before the date of receipt of an election.

(2) Incarcerated veterans. An election to receive disability compensation in lieu of pension is not required for an incarcerated veteran who does not have a dependent spouse or child.

(Authority: 38 U.S.C. 501(a), 1542, 5304)

CROSS REFERENCE: § 5.1, for the definition of "custody of a child".

§ 5.758 Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.

(a) Right to elect Improved Pension. Except as otherwise provided in this section, a pension beneficiary who was entitled on December 31, 1978, to receive Old-Law Pension or Section 306 Pension, may elect at any time to receive Improved Pension instead. An election to receive Improved Pension instead of Old-Law Pension or Section 306 Pension is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(b) When a veteran's spouse is also a veteran who is eligible to elect Improved Pension. If a veteran who is eligible to elect Improved Pension under this section has a spouse who is also a veteran who is eligible to elect Improved Pension under this section, neither veteran may receive Improved Pension unless both elect to receive it.

(c) When a beneficiary chooses to receive Old-Law Pension or Section 306 Pension instead of Improved Pension. If a pension beneficiary who is eligible to elect Improved Pension under this section does not do so, VA will continue to pay that beneficiary Old-Law Pension or Section 306 Pension at the monthly rate in effect on

December 31, 1978, unless that rate must be reduced or discontinued under § 5.470, Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension, or under any other regulation in this part.

(d) Effect of a surviving spouse's election of Improved Pension on the rights of a child. A surviving spouse's election of Improved Pension does not affect the benefits of a surviving child who was receiving, on December 31, 1978, a separate apportioned award of Old-Law Pension or Section 306 Pension.

(Authority: 38 U.S.C. 501(a); Sec. 306(a) and (b), Pub. L. 95-588, 92 Stat. 2508)

§ 5.759 Election between death compensation and dependency and indemnity compensation.

(a) Election between benefits is required. A person who is eligible for both death compensation and dependency and indemnity compensation (DIC) must elect to receive one or the other benefit.

(1) Persons currently receiving death benefits. (i) A person who is currently receiving death compensation may elect to receive DIC.

(ii) An election to receive DIC instead of death compensation is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(2) Persons claiming entitlement to service-connected death benefits. VA will treat a claim for service-connected death benefits as a claim for DIC, subject to

confirmation by the claimant, unless the claimant specifically requests death compensation.

(b) Limitation of election. An election of DIC may not be filed or withdrawn after the death of the surviving spouse, child, or parent. See § 5.742(c) (concerning the finality of an election of DIC when the beneficiary dies before negotiating a DIC check).

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

CROSS REFERENCE: § 5.512, Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

§ 5.760 Electing Improved Death Pension instead of dependency and indemnity compensation.

A surviving spouse who is entitled to receive dependency and indemnity compensation (DIC) may elect to receive Improved Death Pension instead of DIC. Such surviving spouse may subsequently reelect either benefit.

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

§ 5.761 Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.

(a) Concurrent receipt of disability compensation or pension and death benefits. Except as otherwise provided in § 5.464, if a surviving spouse is receiving disability compensation or pension in his or her own right as a veteran, the surviving spouse is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability; or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) Entitlement to death benefits based on the death of more than one veteran. Except as otherwise provided in this regulation or in § 5.464, if a beneficiary is receiving death pension, death compensation, or DIC as the surviving spouse of one veteran, the beneficiary is not barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) Limitation: a surviving spouse is entitled to payment of only one award of death benefits at a time based on the death of more than one veteran to whom the surviving spouse was married—(1) Payment limitation. VA may not pay more than one death pension, death compensation, or DIC award at a time to a surviving spouse based on the death of more than one veteran to whom the surviving spouse was married.

(2) Election. A surviving spouse who is eligible for death pension, death compensation, or DIC because of the deaths of more than one veteran to whom he or

she was married may elect or reelect benefits based on the death of any one such deceased spouse. Benefits payable in the elected case will be offset by any payments the surviving spouse received based on the death of the other spouse for the same period. The offset will occur only if the surviving spouse was entitled to benefits in the elected case before the date of receipt of the election under § 5.512 or § 5.431.

(Authority: 38 U.S.C. 5304(b)(1), (3))

§ 5.762 Payment of multiple VA benefits to a surviving child based on the service of more than one veteran.

(a) A surviving child is entitled to concurrent receipt of disability compensation or pension and death benefits. If a surviving child is receiving disability compensation or pension in his or her own right as a veteran, the surviving child is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability; or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) A surviving child is entitled to more than one award of death benefits based on the death of more than one veteran. Except as otherwise provided in paragraph (c) of this section or in § 5.464, if a surviving child is receiving death pension, death compensation, or DIC as the surviving child of one veteran, the surviving child is not

barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) Exception: child with more than one parent in the same parental line.—(1) Definition. Same parental line means that the child has more than one veteran father or more than one veteran mother for VA purposes. For example, the child's father and stepfather are both veterans.

(2) A surviving child is entitled to payment of no more than one death benefit due to the death of more than one parent in the same parental line. Except for insurance and as provided in this paragraph (c), VA cannot pay more than one death benefit to or for a surviving child because of the death of more than one parent in the same parental line.

(3) Exception: more than one death benefit is payable when the death of both parents in the same parental line occurred before June 9, 1960. If both fathers or both mothers died before June 9, 1960, a child who receives DIC for one parent may receive death pension for the other parent. Unless both fathers or both mothers died before January 1, 1957, such a child may not receive DIC or death compensation for the other parent. If both parents died before January 1, 1957, there is no prohibition on concurrent receipt of death benefits.

(4) Surviving child's right to elect or reelect. If a surviving child is entitled to benefits because of the death of more than one parent in the same parental line, the child has the right to elect or reelect to receive benefits because of the death of either such parent.

(5) Benefits that are awarded as a result of a surviving child's reelection are subject to an offset. VA will grant benefits to the electing child according to the child's reelection. However, VA will offset the new award by subtracting the amount of any payments for the same period which VA previously made under the prior award to or for that child.

(6) Effect of a surviving child's election on a beneficiary of the other parent in the same parental line. (i) When a surviving child elects benefits because of the death of one veteran, and a surviving spouse or another surviving child are eligible for benefits because of the death of another veteran in the same parental line, VA will determine the benefit rate to the surviving spouse or the other surviving child as if the surviving child making the election did not exist.

(ii) Effective date. If VA determines that benefits payable to the surviving spouse or the other surviving child should be increased, reduced, or discontinued as a result of the election or reelection, such increase, reduction, or discontinuance is effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 5304(b))

§ 5.763 Payment of multiple VA benefits to more than one child based on the service of the same veteran.

(a) Scope. This section applies when two or more children are eligible to receive the same type of VA benefit based on the service of a veteran, and at least one child is

also eligible to receive a different type of VA benefit based on the service of the same veteran. The types of VA benefits referred to in this section are as follows:

(1) Dependency and indemnity compensation (DIC); and

(2) Survivors' and Dependents' Educational Assistance (DEA).

(b) General rule. This paragraph (b) applies when one child is eligible for more than one type of VA benefit as provided in paragraph (a) of this section and that child chooses to receive a benefit that is different than the type the remaining child receives. Except as provided in paragraph (c) of this section, VA cannot:

(1) Increase the rate of payment to the remaining child; or

(2) Pay a rate to each remaining child that is greater than the rate payable if all children were receiving the same type of VA benefit.

(c) Exception to general rule. The limitation in paragraph (b) of this section does not apply if the child elects DEA. Unless the child electing DEA is under age 18 or became permanently incapable of self-support before reaching age 18 under § 5.227, VA will pay benefits to the remaining child as if the child electing DEA did not exist. See 38 CFR 21.3023(b) (pertaining to restrictions on concurrent receipt of DEA and other VA benefits).

(Authority: 38 U.S.C. 3512, 3562)

§ 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.

(a) Child who has reached age 18—(1) Election is required. (i) A child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) may not receive VA death pension or dependency and indemnity compensation (DIC) at the same time as Survivors' and Dependents' Educational Assistance under 38 U.S.C. chapter 35 (DEA), and must elect between death pension or DIC and DEA. There is no right of reelection.

(ii) A veteran receiving compensation may not receive additional disability compensation for a child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) at the same time the child receives DEA.

(iii) A veteran receiving pension may not receive increased benefits based on a child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) at the same time the child receives DEA. See §§ 5.400(c) and 5.416.

(2) Effect of election on another beneficiary when there is more than one parent in the same parental line. In cases where a child has more than one parent in the same parental line, if the child elects to receive benefits based on one parent, VA will consider the child's entitlement for purposes of determining the entitlement and rate of another survivor of that parent. For benefits based on the other parent's service, VA will determine the entitlement and rate payable to the survivor of that parent as if the child did not exist.

(3) Effective date. VA will discontinue the electing child's VA death pension or DIC effective the day preceding the beginning date of the DEA allowance. VA will increase payments, pay a reduced rate, or discontinue VA death pension or DIC to the remaining beneficiaries effective the beginning date of the DEA award to the child.

(b) Child who is under age 18 or helpless. Generally, a helpless child or a child who is under age18 may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(c) Surviving spouse. A surviving spouse may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(d) Additional criteria. Provisions concerning concurrent receipt of DEA and VA death pension or DIC are set forth in § 21.3023 of this chapter.

(Authority: 38 U.S.C. 3562)

§ 5.765 Payment of compensation to a parent based on the service or death of multiple veterans.

Neither receipt by a parent of dependency and indemnity compensation on account of the death of a veteran, nor receipt by a parent of pension or compensation on account of his or her military service, will bar receipt by a parent of pension, disability

compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(Authority: 38 U.S.C. 5304(b))

§§ 5.766–5.769 [Reserved]

Subpart M - Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

DETERMINING ELIGIBILITY FOR APPORTIONMENTS

§ 5.770 Apportionment claims.

(a) General.—(1) Veteran. All or part of the pension or disability compensation payable to any veteran may be apportioned:

(i) For his or her spouse, child, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, nursing home, or domiciliary care by the U.S., or any political subdivision thereof.

(ii) If the veteran is not residing with his or her spouse or the veteran's child is not residing with the veteran, and the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support.

(2) Surviving spouse. Where a child of a deceased veteran is not living with the veteran's surviving spouse, the dependency and indemnity compensation (DIC) or pension otherwise payable to the surviving spouse may be apportioned.

(b) Apportionment to a child on active duty. Except as provided in § 5.774(e)(2), no apportionment of disability or death benefits will be made or changed solely because a child has entered active duty.

(c) Apportionment if beneficiary providing for dependents. 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) Apportionment of death benefits. Any amounts payable for children under §§ 5.780 and 5.781 will be equally divided among the children.

(e) Apportionment to a child not residing with surviving spouse. The amount payable for a child in custody of and residing with the surviving spouse will be paid to the surviving spouse. Amounts payable to a surviving spouse for a child in his or her custody but residing with someone else may be apportioned if the surviving spouse is not reasonably contributing to the child's support.

(Authority: 38 U.S.C. 5307, 5502(d))

§ 5.771 Special apportionments.

(a) General. Without regard to any provision regarding apportionment other than § 5.774(b), (c), and (f), where hardship is shown to exist, pension, disability

compensation, or dependency and indemnity compensation may be specially apportioned between the veteran and his or her dependent or between the surviving spouse and a child. Such an apportionment will be based on the facts in the individual case. The apportionment may not cause undue hardship to the person from whose benefits the apportionment is made.

(b) Factors that determine a special apportionment. In determining the basis for special apportionment, consideration will be given to such factors as:

(1) The amount of benefits payable;

(2) The net worth, income, and expenses of the beneficiary and any dependent on whose behalf apportionment is claimed; and

(3) The special needs of the veteran, his or her dependent, and the apportionment claimant.

(c) Apportioned amount. 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 while apportionment of less than 20 percent of his or her benefits would not provide a reasonable amount for any apportionee.

(Authority: 38 U.S.C. 5307)

§ 5.772 Veteran’s benefits apportionable.

A veteran’s benefits may be apportioned:

(a) General. If the veteran is not residing with his or her spouse or his or her child, the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support, and a claim for apportionment is filed by or for the spouse or child.

(b) Pending appointment of fiduciary. Pending the appointment of a guardian or other fiduciary.

(c) Veteran receiving hospital, domiciliary, or nursing home care.

(1) Incompetent veteran. (i) Spouse or child. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her benefit may be apportioned for a spouse or child unless such benefit is paid to a spouse (“as wife” or “as husband”) for the use of the veteran and his or her dependents.

(ii) Dependent parent. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her disability compensation may be apportioned 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) Competent veteran.—(i) Section 306 Pension. Where the amount of Section 306 Pension payable to a married veteran is reduced to $50 monthly under § 5.726, 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.

(ii) Improved Pension. Where the amount of Improved Pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to $90 monthly under § 5.722, 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 were 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.

(d) Apportionment of additional disability compensation for dependent parent. Where additional disability compensation is payable for 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 disability compensation will be paid to the parent upon receipt of a claim.

(Authority: 38 U.S.C. 501(a), 5307, 5502, 5503(a); Pub. L. 95-588, § 306, 92 Stat. 2497)

CROSS REFERENCE: §§ 5.711, Payment to dependents due to the disappearance of a veteran for 90 days or more; 5.722, Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care; 5.725, Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care; 5.726, Reduction of Section 306 Pension while

a veteran is receiving hospital, domiciliary, or nursing home care; 5.729, Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care; 5.792, Institutional awards; 5.814, Apportionment when a primary beneficiary is incarcerated.

§ 5.773 Veterans disability compensation.

Rates of apportionment of disability compensation will be determined under § 5.771.

§ 5.774 Benefits not apportionable.

VA will not apportion benefits:

(a) If the total benefit payable does not permit payment of a reasonable amount to any apportionee.

(b) If a court of proper jurisdiction has found the veteran's spouse guilty of adultery.

(c) If VA determines that the veteran's spouse has lived with another person and has openly held himself or herself out to the public to be the spouse of that person unless:

(1) The spouse subsequently reconciled with the veteran and later became estranged from the veteran; or

(2) The spouse had entered into the relationship with the other person in good faith. For purposes of this paragraph (c)(2), good faith means that the spouse had a reasonable basis to believe that the marriage to the veteran was legally terminated (for example, due to trickery on the part of the veteran).

(d) If another person legally adopts a veteran's child, except VA may apportion the additional disability compensation payable to a veteran for the child or the additional dependency and indemnity compensation payable to a surviving spouse for the child.

(e)(1) If the apportionment is claimed for a child who is on active duty.

(2) If a child is receiving apportioned benefits directly and then enters active duty. The apportionment will be discontinued and such benefits will be paid to the veteran. The effective date of the discontinuance will be the first day of the month after the month for which VA last paid the apportionment.

NOTE TO PARAGRAPH (e)(2): In accordance with § 5.770(b), if a child is included in an existing apportionment to an estranged spouse and then enters active duty, no adjustment in the apportioned award will be made based on the child's entry into service.

(f)(1) To any beneficiary's dependent who:

(i) Is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or its allies; or

(ii) Participated in the acts that caused forfeiture for fraud or treasonable acts.

(2) After September 1, 1959, if a veteran or other primary beneficiary:

(i) forfeited benefits for fraud or for a treasonable act; or

(ii) was convicted of subversive activity after September 1, 1959.

CROSS REFERENCE: §§ 5.676, Forfeiture for fraud, 5.677, Forfeiture for treasonable acts, and 5.678, Forfeiture for subversive activity.

(g) Unless the estranged spouse of a veteran files a claim for an apportionment. If there is a child of the veteran not in his or her custody, an apportionment will not be authorized unless a claim for an apportionment is filed by or for the child.

(Authority: 38 U.S.C. 5307, 6103(b), 6104(c), 6105(a))

§§ 5.775–5.779 [Reserved]

§ 5.780 Eligibility for apportionment of pension.

(a) Disability pension. Disability pension will be apportioned to the veteran's spouse or child, if the veteran is not residing with his or her spouse, or if the veteran's child is not residing with the veteran, and the veteran is not reasonably discharging his

or her responsibility for the spouse's or child's support. Apportionment of these benefits will be made under § 5.771.

(b) Death pension.—(1) Old-Law Death Pension or Section 306 Death Pension. Old-Law Death Pension or Section 306 Death Pension will be apportioned to a child of a deceased veteran who is not in the custody of the surviving spouse. Apportionment of these benefits will be made at the rates approved by the Under Secretary for Benefits except when the facts and circumstances in a case warrant apportionment under § 5.771.

(2) Improved Death Pension. Improved Death Pension will be apportioned to the veteran's child if a child of the deceased veteran is not in the custody of the surviving spouse. Apportionment of these benefits will be made under § 5.771.

(Authority: 38 U.S.C. 5307)

§ 5.781 Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.

(a) Conditions under which apportionment may be made. The surviving spouse's award of dependency and indemnity compensation (DIC) will be apportioned where there is a child under 18 years of age and not in the custody of the surviving spouse. The surviving spouse's award of DIC will not be apportioned under this paragraph (a) for a child over age 18 years.

(b) Rates payable. The DIC share for each child 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 the additional allowance payable for each dependent child, except when the facts and circumstances in a case warrant special apportionment under § 5.771. Current and historical DIC rates can be found on the Internet at http://www.va.gov or are available from any Veterans' Service Center. The share for the surviving spouse will be the difference between the children's share and the total amount payable.

§ 5.782 Effective date of apportionment grant or increase.

(a) General rule. Except as provided in paragraph (b) of this section, the effective date of an apportionment or an increased apportionment is the first day of the month after the month in which VA receives an apportionment claim or a claim for an increased apportionment.

(b) Exceptions to general rule.—(1) Claim for benefits is pending. This paragraph (b)(1) applies if a veteran or surviving spouse (primary beneficiary) has a claim for benefits pending on the date that VA receives an apportionment claim. The effective date of the apportionment will be the effective date of the primary beneficiary's award, or the date the apportionment claimant's entitlement arose, whichever is later.

(2) Apportionment claimant not yet established as the beneficiary's dependent. This paragraph (b)(2) applies if VA receives an apportionment claim within 1 year of the award of benefits to the primary beneficiary and the apportionment claimant has not been established as a dependent on the primary beneficiary's award. The effective

date of the apportionment will be the effective date of the primary beneficiary's award, or the date the apportionment claimant's entitlement arose, whichever is later.

(3) Veteran's or surviving spouse's benefits are reduced or discontinued. Except as provided in paragraph (b)(4) of this section, this paragraph (b)(3) applies if a veteran's or surviving spouse's benefits have been reduced or discontinued but an apportionment of the benefits that would otherwise be payable to the primary beneficiary is authorized. In this situation, the effective date of the apportionment is the same as the date on which the primary beneficiary's benefits were reduced or discontinued, if VA receives the apportionment claim within 1 year after that date and the apportionment claimant is otherwise shown to be entitled to an apportionment from that date.

(4) The primary beneficiary is incarcerated. The effective date of an apportionment or increased apportionment when the primary beneficiary is incarcerated is specified in § 5.814(e).

(Authority: 38 U.S.C. 501(a), 5110)

§ 5.783 Effective date of reduction or discontinuance of apportionment.

(a) General rule. Except as otherwise provided in this part, if VA reduces or discontinues an apportionment because the basis for the apportionment no longer exists, then the effective date of the reduction or discontinuance will be the first day of the month after the month in which the basis for the apportionment ceased to exist.

(b) Exceptions to general rule.—(1) Death, divorce, or marriage of an apportionee. The effective date of discontinuance of an apportionment due to the death, divorce, or marriage of the apportionee is the first day of the month of the event, except the effective date of discontinuance of an apportionment of Old-Law Pension or Section 306 Pension will be January 1 of the calendar year immediately after the event.

NOTE TO PARAGRAPH (b)(1): The effective date of discontinuance of the dependency allowance on the primary beneficiary's award due to the death, divorce, or marriage of the apportionee is determined in accordance with § 5.184 or § 5.477.

(2) Death or marriage of dependent of apportionee. The effective date of discontinuance of an apportionment due to the death or marriage of a child included in an existing apportionment to an estranged spouse or another custodian of the child is the first day of the month after the month of the event.

(3) Primary beneficiary dies or entitlement ends. The effective date of discontinuance of an apportionment because the primary beneficiary dies or loses entitlement to the primary benefit is the same effective date that applies to the discontinuance of the primary benefit.

(4) Primary beneficiary no longer incarcerated. The effective date of discontinuance or reduction of an apportionment because the primary beneficiary is no longer incarcerated is specified in § 5.815 or § 5.816, depending on the primary benefit being apportioned.

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

§ 5.784 Special rules for apportioned benefits on death of beneficiary or apportionee.

(a) Payment to person receiving apportionment when the beneficiary dies. If an apportionment has not been paid and the beneficiary dies, then VA will pay the apportionee the unpaid apportionment through the first day of the month of the beneficiary's death. Except as provided in paragraph (b) of this section, the unpaid apportionment is not subject to payment as accrued benefits.

(b) Person receiving apportioned share of benefits dies.—(1) Receiving apportionment of veteran's benefits. If a person receiving an apportionment of a veteran's benefits dies, then VA will pay any unpaid apportionment to the veteran, if living. If the veteran is not living, then the unpaid apportionment is payable only as accrued benefits to dependents of the veteran, under § 5.551(b)(1). If there is no eligible dependent claimant, then the unpaid apportionment is payable only as accrued benefits to the person who bore the expense of the deceased apportionee's last sickness or burial under § 5.551(e).

(2) Receiving apportionment of surviving spouse's death benefits. If a child receiving an apportionment of a surviving spouse's dependency and indemnity compensation (DIC) or death pension dies, then the unpaid apportionment is payable only as accrued benefits to the veteran's surviving child who is entitled to death DIC or pension, under § 5.551(d)(1). If there is no eligible surviving child claimant, then the unpaid apportionment is payable only as accrued benefits to the person.

(Authority: 38 U.S.C. 5112(b)(1), 5121(a), 5502(d))

§§ 5.785–5.789 [Reserved]

INCOMPETENCY AND PAYMENTS TO FIDUCIARIES AND MINORS

§ 5.790 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: (1) contract; or

(2) manage his or her own affairs, including disburse funds without limitation.

(b) Authority. (1) Agencies of original jurisdiction have sole authority to make official determinations of incompetency and competency for purposes of insurance (38 U.S.C. 1922) 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 Veterans Service Center Manager or Pension Management Center Manager will:

(i) Develop information as to the beneficiary's social, economic, and industrial adjustment;

(ii) Appoint or recommend appointment of a fiduciary as provided in § 13.55 of this chapter;

(iii) 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; and

(iv) Authorize disbursement of the benefit.

(3) If, in the course of fulfilling the responsibilities assigned in paragraph (b)(2) of this section, the Veterans Service Center Manager or Pension Management Center Manager 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 agency of original jurisdiction with a statement as to his or her findings. The agency of original jurisdiction 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 § 5.102, 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 and convincing as to the person's incompetency, the agency of original jurisdiction 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. A determination of 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 determination of incompetency.

(d) Presumption in favor of competency. When the evidence is in equipoise regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including to disburse funds without limitation, VA will give the benefit of the doubt to the beneficiary and find that he or she is competent. See § 5.3(b)(3).

(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 § 5.83. 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.

(f) Effective date.—(1) Incompetency determination. The effective date of a determination of incompetency is the date of the rating decision finding incompetency. (This paragraph (f)(1) does not apply to an incompetency determination made for insurance purposes under 38 U.S.C. 1922.)

(2) Competency determination. If a beneficiary previously determined to be incompetent is later determined to be competent, the effective date of the determination of competency is the date the evidence of record shows the beneficiary regained competence.

(Authority: 38 U.S.C. 501(a), 5502)

§ 5.791 General fiduciary payments.

(a) Payments to a fiduciary and to or on behalf of a beneficiary.—(1) Payment to a fiduciary. VA may pay benefits to a duly recognized fiduciary on behalf of a person who is mentally incompetent or who is a minor.

(2) Direct payment to or on behalf of a beneficiary. If the Veterans Service Center Manager or Pension Management Center Manager determines that it is in the best interest of a mentally incompetent or minor beneficiary, VA may pay benefits, regardless of any legal disability on the part of the beneficiary, directly to:

(i) The beneficiary; or

(ii) A relative of the beneficiary, or another person, for the use of the beneficiary.

(3) Direct payment to certain minors. Unless otherwise contraindicated by evidence of record, payment will be made directly to the following classes of minors without any referral to the Veterans Service Center Manager or Pension Management Center Manager:

(i) Those who are serving in or have been discharged from the military forces of the U.S.; and

(ii) Those who qualify for survivors benefits as a surviving spouse.

(4) Immediate payment to spouse of incompetent veteran. Unless otherwise contraindicated by evidence of record, if a veteran has no guardian, VA may immediately pay benefits to the spouse of an incompetent veteran for the use of the veteran and his or her dependents prior to referral to the Veterans Service Center Manager or Pension Management Center Manager. See § 13.57 of this chapter.

CROSS REFERENCE: Part 13 of this title regarding VA fiduciary activities.

(b) Payment to the parent of the child. Where a child is in the custody of a natural parent, adoptive parent, or stepparent, benefits payable to the child may be paid to the parent as custodian of the child.

(c) Payment to custodian-in-fact. All or any part of a benefit due a minor or incompetent adult, payment of which is suspended or withheld because payment may not be properly made to an existing fiduciary, may be paid temporarily to the person having custody and control of the beneficiary. See § 13.63 of this chapter.

(d) Payment to bonded officer of Indian reservation. Any benefits due an incompetent adult or minor Indian, who is a recognized ward of the Government, may

be awarded to the superintendent or other bonded officer designated by the Secretary of the Interior to receive funds under 25 U.S.C. 14. See § 13.62 of this chapter.

(e) Effective date for payment to a fiduciary. The effective date of payment to a fiduciary is the first day of the month after the month for which VA last paid benefits to the beneficiary.

NOTE TO PARAGRAPH (e): The initial payment to the fiduciary will include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(Authority: 38 U.S.C. 5502)

§ 5.792 Institutional awards.

(a) General. When an incompetent veteran entitled to pension or disability compensation is a patient in a hospital or other institution, VA may pay all or part of the benefit to the chief officer of the hospital or institution for the veteran's use and benefit if the Veterans Service Center Manager or Pension Management Center Manager determines that such payment will:

(1) Adequately provide for the needs of the veteran; and

(2) Obviate the need for appointment of another type of fiduciary.

CROSS REFERENCE: Section 13.61 of this chapter, Payment to the chief officer of institution.

(b) Non-VA hospital or institution. (1) In an institutional award of pension or disability compensation, VA may pay to the chief officer of a non-VA hospital or institution on behalf of the veteran an amount determined under § 13.61 of this chapter.

(2) Any excess funds held by the chief officer of a non-VA institution under this section that are not necessary for the benefit of the veteran will be returned to VA or to a fiduciary, if one has been appointed.

(3) If payments are being made to the chief officer of a non-VA hospital or institution, VA will deposit all sums otherwise payable in excess of the institutional award and any apportionments in Personal Funds of Patients.

(c) Excess funds. Upon the death of an institutionalized incompetent veteran with no surviving heirs, excess funds will be returned to VA.

(d) Apportionment. An institutionalized incompetent veteran's benefits may be apportioned to his or her dependents under § 5.771.

(e) Effective date for payment of institutional award. The effective date of payment to the chief officer of a hospital or institution is:

(i) The first day of the month after the month for which VA last paid benefits; or

(ii) On an initial or resumed award, the date of entitlement to benefits, subject to any amounts paid or withheld for apportionment of benefits.

(f) Effective date for discontinuance of institutional award. The effective date of discontinuance of payment to the chief officer of the hospital or institution is the first day of the month after the month:

(1) A fiduciary is appointed;

(2) The veteran is discharged from the hospital or institution; or

(3) The veteran is rated competent.

(Authority: 38 U.S.C. 501(a), 5307, 5502)

§ 5.793 Limitation on payments for a child.

If a fiduciary has been appointed for a child because the child is a minor, then VA will not pay benefits to that fiduciary for any period beginning on the date that the child attains the age of majority under the law of the State where the child resides. For any period beginning on that date, if payment is otherwise in order, then VA will pay benefits as follows:

(a) Competent child reaches age of majority. If the child is competent, then VA will pay benefits directly to the child. Under these circumstances, VA will retroactively pay the child any benefits that were not paid for a period before the child attained the age of majority.

(b) Incompetent child reaches age of majority. If the child is incompetent, then VA will pay benefits to a fiduciary appointed for the child as a mentally incompetent adult unless benefits are paid directly to the child under § 5.791(a)(2)(i).

§ 5.794 Beneficiary rated or reported incompetent.

(a) General. VA will not routinely suspend payments directly to a beneficiary who is or may be incompetent while any of the following is pending:

(1) Development of the issue of incompetency;

(2) Certification of a fiduciary by the Veterans Service Center Manager or Pension Management Center Manager; or

(3) A recommendation by the Veterans Service Center Manager or Pension Management Center Manager that payments should be paid directly to the beneficiary.

(b) Application. This policy applies to all cases including, but not limited to, cases in which:

(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; or

(3) The beneficiary has been rated incompetent by VA.

§ 5.795 Change of name of fiduciary.

If a fiduciary changes his or her name because of marriage or divorce, VA will accept the fiduciary's statement of the name change.

§ 5.796 Child's benefits to a fiduciary of an incompetent surviving spouse.

If benefits are payable to a surviving spouse for a child and the child is separated from the surviving spouse because of the surviving spouse's incompetency, no apportionment of benefits to the child is required. If the fiduciary is adequately taking care of the needs of the child from the surviving spouse's estate, either voluntarily or pursuant to a decree of court, VA may pay all amounts payable for the child to the fiduciary.

§ 5.797 Testamentary capacity for VA insurance purposes.

When VA refers a case to an agency of original jurisdiction involving the testamentary capacity of the insured to perform a testamentary act (execute a designation or change of beneficiary or execute a designation or change of option), the following considerations will apply:

(a) Testamentary capacity means that degree of mental capacity necessary to enable a person to perform a testamentary act. This generally requires that the insured:

(1) Reasonably comprehend the nature and significance of his or her testamentary act, that is, the subject and extent of his or her disposition;

(2) Recognize the object of his or her bounty; and

(3) Appreciate the consequences of his or her testamentary act, uninfluenced by any material delusion as to the property or persons involved.

(b) VA will consider all evidence of record, with emphasis being placed on evidence pertaining to the mental condition of the insured at the time, or nearest to the time, that the insured performed the testamentary act.

(c) There is a general but rebuttable presumption that every insured person possesses testamentary capacity when performing a testamentary act. Therefore, reasonable doubt should be resolved in favor of testamentary capacity. See § 5.3(b)(2).

§ 5.798 Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded $25,000.

If a veteran who was denied payment of disability compensation under § 3.853 of this chapter is subsequently rated competent for a continuous period of more than 90 days, the withheld disability compensation will be paid to the veteran in a lump-sum.

CROSS REFERENCE: § 3.853 of this title, Incompetents; estate over $25,000 (denying payment of disability compensation to an incompetent veteran who had no dependents and had an estate that exceeded $25,000, during the period from November 1, 1990, through September 30, 1992).

(Authority: 38 U.S.C. 5505, as in effect before Nov. 2, 1994)

§§ 5.799–5.809 [Reserved]

PAYMENTS TO INCARCERATED BENEFICIARIES

§ 5.810 Incarcerated beneficiaries – general provisions and definitions.

(a) Definitions.—(1) Incarceration means confinement in a Federal, State, or local prison, jail, or other penal institution, including a private detention facility pursuant to an agreement with a Federal, State, or local unit of government. "Incarceration" does not include house arrest, parole, probation, work release, participation in a community control program, commitment to a halfway house or residential re-entry center, or confinement in a foreign country's prison.

(2) Felony, for purposes of §§ 5.811 through 5.817, means any offense punishable by death or incarceration for a term exceeding 1 year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.

(b) Classification of foreign offenses. A felony includes an offense that is prosecuted by a foreign country if the offense is equivalent to a felony under the laws of the U.S. A misdemeanor includes an offense that is prosecuted by a foreign country if the offense is equivalent to a misdemeanor under the laws of the U.S.

(c) Length of incarceration. The 60-day periods of incarceration described in §§ 5.811 through 5.813 begin on the day after the beneficiary is convicted of a felony (or misdemeanor for pension), if the beneficiary is incarcerated as of that date, even if the

beneficiary is not sentenced on that date. For beneficiaries who are reincarcerated, such as after conditional release on probation or parole, VA will begin counting a new 60-day period on the first full day of reincarceration.

(d) Requirement to inform VA. A claimant or beneficiary must inform VA when he or she becomes incarcerated for:

(1) Conviction of a felony if the person is claiming or receiving compensation, pension, or dependency or indemnity compensation; or

(2) Conviction of a misdemeanor if the person is claiming or receiving pension.

(e) Notice to the incarcerated beneficiary. VA will send notice to the incarcerated beneficiary that dependents may be entitled to an apportionment while the beneficiary is incarcerated. The notice will also include information explaining the conditions under which VA may resume payments to the incarcerated beneficiary after the beneficiary is released from incarceration.

(f) Effective dates. Payments of disability compensation, dependency and indemnity compensation, or pension will be reduced or discontinued (whichever is appropriate under §§ 5.811 through 5.813) on the 61st day of incarceration after conviction of a felony. Payments of pension will also be reduced on the 61st day of incarceration after conviction of a misdemeanor.

(Authority: 38 U.S.C. 501(a), 1505, 5313)

§ 5.811 Limitation on disability compensation during incarceration.

(a) General. VA will limit the amount of disability compensation paid to a veteran who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The veteran committed the felony after October 7, 1980;

(2) The veteran was incarcerated on October 1, 1980, for conviction of the felony and was awarded disability compensation after September 30, 1980 (This paragraph (a)(2) applies only to the payment of disability compensation after September 30, 1980.); or

(3) The veteran was incarcerated on October 7, 1980, for conviction of the felony and remained incarcerated for that felony on December 27, 2001. (This paragraph (a)(3) applies only to the payment of disability compensation after March 31, 2002.)

(b) Retroactive awards. Whenever disability compensation is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section will be paid to the incarcerated person.

(c) Amount payable during incarceration.—(1) Veteran rated 20 percent or more disabled. For an incarcerated veteran who is rated 20 percent or more disabled for service-connected disabilities, VA will limit disability compensation to no more than the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled.

(2) Veteran rated less than 20 percent disabled. For an incarcerated veteran who is entitled to compensation and is rated less than 20 percent disabled for service-

connected disabilities, VA will limit disability compensation to no more than one-half the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled. This paragraph (c)(2) applies even if such a veteran is entitled to special monthly compensation under 38 U.S.C. 1114(k) or (q).

CROSS REFERENCE: For the rule on total-disability ratings based on individual unemployability that would first become effective while a veteran is incarcerated, see § 5.284(b).

(Authority: 38 U.S.C. 501(a), 1114, 5313; Pub. L. 107-103, § 506, 115 Stat. 996-97)

§ 5.812 Limitation on dependency and indemnity compensation during incarceration.

(a) General. VA will limit dependency and indemnity compensation (DIC) paid to a beneficiary who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The beneficiary committed the felony after October 7, 1980; or

(2) The beneficiary was incarcerated on October 1, 1980, for conviction of the felony and was awarded DIC after September 30, 1980. (This paragraph (a)(2) applies only to the payment of DIC after September 30, 1980.)

(b) Amount payable during incarceration. VA will limit DIC to no more than one-half the rate of disability compensation payable under 38 U.S.C. 1114(a) to a veteran rated 10 percent disabled.

(c) Parents' DIC—Effect on non-incarcerated parent. If two parents are both entitled to DIC and were living together before the benefits payable to one were reduced due to incarceration, VA will determine entitlement to DIC for the other parent as if they were not living together.

(d) Retroactive awards. Whenever DIC is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section will be paid to the incarcerated person.

(Authority: 38 U.S.C. 501(a), 1114, 5313)

§ 5.813 Discontinuance of pension during incarceration.

(a) General provision. VA will discontinue pension payments to or for a person who has been incarcerated for more than 60 days after conviction of a felony or of a misdemeanor. This section applies to any pension that VA administers under a public or private law.

(b) Veteran entitled to pension and disability compensation. When an incarcerated veteran is disqualified from receiving pension payments under this section

but is also entitled to disability compensation, VA will pay disability compensation in lieu of pension under either of the circumstances described in paragraphs (b)(1) or (2) of this section.

(1) If the veteran does not have a spouse or child, then the award of disability compensation in such cases will be effective on the date pension is discontinued under this section.

(2) If the veteran has a spouse or child but elects to receive disability compensation after VA has notified the veteran of the effect of electing disability compensation on the amount available for apportionment, then the award of disability compensation will be effective on the later of the date VA received the veteran's election or the date of discontinuance of pension under paragraph (a) of this section. (If the veteran does not elect disability compensation, pension will nevertheless be discontinued under paragraph (a) of this section.)

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.814 Apportionment when a primary beneficiary is incarcerated.

(a) Notice to dependents of incarcerated beneficiary. (1) When VA limits or discontinues benefits under §§ 5.811 through 5.813, VA will send notice to any dependent of the right to apply for an apportionment if VA is aware of the dependent's existence and can obtain the necessary address.

(2) If an apportionment is awarded, VA will send notice to the apportionee that VA will immediately discontinue the apportionment when the incarcerated beneficiary is

released. The notice will also inform the apportionee that if the apportionee and the incarcerated beneficiary do not live together when the incarcerated beneficiary is released, the apportionee may submit a new apportionment claim.

(b) Apportionment of disability compensation or dependency and indemnity compensation.—(1) Eligibility for apportionment. (i) VA may apportion an incarcerated veteran's unpaid disability compensation to the veteran's spouse, child, or dependent parent.

(ii) VA may apportion an incarcerated surviving spouse's unpaid dependency and indemnity compensation (DIC) to a child.

(iii) VA may apportion an incarcerated child's unpaid DIC to the surviving spouse or to another child.

(2) Amount of apportionment. The apportionment amount of a beneficiary's unpaid disability compensation or DIC benefits will be based on individual need. In determining individual need, VA will consider factors such as:

(i) The amount of benefits available to be apportioned;

(ii) The net worth, income, and expenses of the apportionment claimant(s); and

(iii) The special needs of the apportionment claimant(s).

(c) Apportionment of veteran's pension.—(1) Requirements. VA may apportion an incarcerated veteran's unpaid pension to the veteran's spouse or child if all of the following conditions are met:

(i) The veteran would continue to be entitled to pension if not for the incarceration;

(ii) The annual income of the spouse or child is such that Improved Death Pension would be payable;

(iii) If the veteran was receiving Old-Law Pension, the spouse or child was recognized by VA as the veteran's dependent before July 1, 1960; and

(iv) If the veteran was receiving Section 306 Pension, the spouse or child was recognized by VA as the veteran's dependent before January 1, 1979.

(2) Amount of apportionment. VA will apportion an amount of such unpaid pension equal to the lesser of:

(i) The amount of Improved Death Pension that would be payable to the apportionee; or

(ii) The amount of pension that the veteran received for the month before incarceration.

(d) Allocation of death pension. The effective date rules in paragraph (e) of this section and in § 5.816(c) apply to the allocation of death pension under this paragraph (d).

(1) If a surviving spouse is disqualified from receiving pension payments under § 5.813, VA may pay a child the rate of Improved Death Pension that would be payable if the incarcerated surviving spouse did not exist.

(2) If a surviving child is disqualified from receiving pension payments under § 5.813, VA may pay a surviving spouse or another child the rate of Improved Death Pension that would be payable if the incarcerated child did not exist.

(e) Effective date of apportionment because of incarceration.—(1) General. Except as provided in paragraph (e)(2) of this section, the effective date of an apportionment or allocation is the date VA receives an apportionment claim.

(2) Specific effective dates.—(i) Disability compensation, dependency and indemnity compensation, and disability pension. The effective date of an apportionment of disability compensation, dependency and indemnity compensation (DIC), or disability pension is the date of the reduction or discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if VA receives an apportionment claim no later than 1 year after the notice required by § 5.810(e) (notifying the incarcerated beneficiary that his or her dependents may be entitled to an apportionment) and if any necessary evidence is received by VA no later than 1 year after the date of VA's request for the evidence.

(ii) Death pension. The effective date of an allocation of death pension is the date of the discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if evidence of income is received by VA no later than 1 year after the date of VA's request for the evidence.

(3) Retroactive awards. If VA retroactively grants an apportionment or allocation under this section, VA will:

(i) Not re-pay to the apportionee any benefits previously paid to the primary beneficiary; and

(ii) Consider any amounts that were paid to the primary beneficiary, but were due to the apportionee, as having been paid to the apportionee.

(Authority: 38 U.S.C. 501(a), 1505, 5313)

§ 5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.

(a) Effective date of benefit resumption. Except as provided in paragraph (d) of this section, if the beneficiary remains entitled to disability compensation or dependency and indemnity compensation (DIC):

(1) The effective date of resumption of the full benefit rate upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of the full benefit rate is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(b) Benefits were apportioned and all apportionees reunited. This paragraph (b) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a

dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) Effective date of apportionment discontinuance. As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) Retroactive payments to released beneficiary. For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period.

(c) Released beneficiary not reunited with all apportionees. This paragraph (c) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is not reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) Effective date of apportionment reduction or discontinuance. As soon as VA is informed that the beneficiary has been released, VA will:

(i) Discontinue the apportionment to an apportionee with whom the beneficiary is reunited effective the first day of the month after the month for which VA last paid the apportionment; and

(ii) Reduce an apportionment to an apportionee with whom the beneficiary is not reunited to the additional amount payable to the beneficiary for the apportionee effective the first day of the month after the month for which VA last paid the apportionment. VA will pay the beneficiary the full benefit rate minus the new apportionment amount effective on date of the apportionment reduction.

(2) Retroactive payments to released beneficiary. For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance or reduction of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period.

(d) Conviction overturned on appeal. If a conviction is overturned on appeal and the beneficiary remains entitled to disability compensation or DIC, the effective date of resumption of the full benefit rate is the date of reduction of benefits. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(Authority: 38 U.S.C. 501(a), 5313)

§ 5.816 Resumption of pension upon a beneficiary's release from incarceration.

(a) Effective date of benefit resumption. If the beneficiary remains entitled to pension:

(1) The effective date of resumption of pension upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of pension is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(b) Disability pension was apportioned. This paragraph (b) applies if VA apportioned a veteran's disability pension under § 5.814(c) or disability compensation under § 5.814(b) because the veteran elected to receive disability compensation in lieu of disability pension under § 5.813(b)(2).

(1) Effective date of apportionment discontinuance. As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) Retroactive payments to released beneficiary. For the period from the effective date of resumption of pension to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period (under § 5.813(b) if the veteran was entitled to disability compensation at the incarcerated rate).

(c) Death pension was allocated. This paragraph (c) applies if VA allocated death pension under § 5.814(d).

(1) Effective date of reduction or discontinuance. As soon as VA is informed that the beneficiary has been released, VA will reduce or discontinue the rate of Improved Death Pension paid to a surviving spouse or surviving child under § 5.814(d), effective the first day of the month after the month for which VA last allocated Improved Death Pension.

(2) Retroactive pension payments to released beneficiary. For the period from the effective date of resumption of pension to the effective date of the reduction or discontinuance of pension to a surviving spouse or surviving child, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the difference between:

(i) The rate paid to the surviving spouse or surviving child under § 5.814(d) for that period; and

(ii) The rate that would have been payable to the surviving spouse or surviving child for that period if the released beneficiary's pension had not been discontinued under § 5.813.

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.817 Fugitive felons.

(a) General rule. VA will not pay or apportion disability compensation, dependency and indemnity compensation, or Improved Pension to, for, or on behalf of a person for any period during which that person is a fugitive felon.

(b) Definitions.—(1) Fugitive felon means a person who is:

(i) Fleeing to avoid prosecution for a felony or for an attempt to commit a felony;

(ii) Fleeing custody or confinement after conviction of a felony or conviction of an attempt to commit a felony; or

(iii) Fleeing to avoid custody or confinement for violating a condition of probation or parole imposed for commission of a felony under Federal or State law.

(2) Felony. For purposes of this § 5.817, felony refers to an offense that is classified as a felony under the laws of the place from which the person flees; however, it also includes an offense classified as a high misdemeanor that would be a felony offense under Federal law.

(Authority: 38 U.S.C. 5313B)

Appendix A to Part 5 - Distribution of Part 3 Provisions
Note to users: The designation "introduction" in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, "3.400 (introduction)" designates the text of 3.400 preceding 3.400(a)-(z) and "5.268(c)(1) (introduction)" designates 5.268(c)(1) preceding 5.268(c)(1)(i)-(iv).

Part 3 Provision	Part 5 Provision
1.9(b)(1)	5.1 definition of "VA"
3.1(a)	5.1 definition of "Armed Forces"
3.1(b)	5.1 definition of "Reserve component"
3.1(c)	5.1 definition of "Reserve" or "reservist"
3.1(d)	5.1 definition of "Veteran"
3.1(e)	5.20
3.1(f)	5.20
3.1(g)	5.1 definition of "Secretary Concerned"
3.1(h)	5.1 definition of "Disharged or released from active military service"
3.1(i)	5.1 definition of "State"
3.1(j)	5.191
3.1(k)	5.1 definition of "Service-connected", 5.241(a), 5.241(b)
3.1(l)	5.1 definition of "Nonservice connected"
3.1(m) (first sentence)	5.660(b)
3.1(m) (second sentence)	5.660(d)
3.1(m)(1)	5.660(c)
3.1(m)(2)	5.660(c)
3.1(m)(3)	5.660(c)
3.1(n)	5.1 definition of "Willful misconduct"
3.1(n) (introduction first sentence)	5.1 definition of "Willful misconduct"
3.1(n) (introduction second sentence)	5.661(f)
3.1(n)(1)	5.1 definition of "Willful misconduct"
3.1(n)(2)	5.1 definition of "Willful misconduct"
3.1(n)(3)	5.661(b)(1)
3.1(o)	5.1 definition of "Political subdivision of the U.S."
3.1(p)	5.1 definition of "Claim"
3.1(q)	5.1 definition of "Notice"
3.1(r)	5.151
3.1(s)	No part 5 provision
3.1(t)	No part 5 provision
3.1(u)	5.460(a)
3.1(v)	5.460(b)

3.1(w)	5.370(d)
3.1(x)	No part 5 provision
3.1(y) (introduction)	5.140(b)(1)
3.1(y)(1)	5.140(a)
3.1(y)(2)	5.140(b)
3.1(y)(3)	5.140(a)
3.1(y)(4)	5.140(b)
3.1(y)(5)	5.140(b)
3.1(z)	5.1 definition of “Nursing home”
3.1(aa)(1)	5.1 definition of “Fraud”
3.1(aa)(2)	5.1 definition of “Fraud”
3.2	5.20
3.3(a)(1)	No part 5 provision
3.3(a)(2)	No part 5 provision
3.3(a)(3)	5.371(b), 5.372(a)
3.3(a)(3)(i)	5.372(b)
3.3(a)(3)(ii)	5.372(b)
3.3(a)(3)(iii)	5.372(b)
3.3(a)(3)(iv)	5.372(b)
3.3(a)(3)(v)	5.371(d)
3.3(a)(3)(vi)(A)	5.380
3.3(a)(3)(vi)(B)(*1*)	5.380
3.3(a)(3)(vi)(B)(*2*)	5.380
3.3(a)(3)(vi)(B)(3)	No part 5 provision
3.3(a)(3)(vi)(B)(4)	No part 5 provision
3.3(b)(1)	No part 5 provision
3.3(b)(2)	No part 5 provision
3.3(b)(3)	No part 5 provision
3.3(b)(4)	5.371(c)
3.3(b)(4)(i)	5.372(b)
3.3(b)(4)(ii)	5.372(c)
3.3(b)(4)(iii)	5.371(d)
3.4(a)	5.240(a)
3.4(a), 3.4(b)(1)	5.240(a)
3.4(b)(2)	5.240(b)
3.4(c)(1)	5.560(b)
3.4(c)(2)	No part 5 provision
3.5(a)	5.510(a)
3.5(b)	5.510(b)(1)(ii)
3.5(c)	5.512
3.5(d)	5.510(c)

3.6(a)	5.21(a)
3.6(b)(1)	5.22(a), 5.23(a)(1), 5.23(b)(1)
3.6(b)(2)	5.25(a)(1)
3.6(b)(3)	5.25(b)
3.6(b)(4)	5.24(a)
3.6(b)(5)	5.24(b)(1)
3.6(b)(6)	5.29(a)(1)
3.6(b)(7)	5.22(b), 5.24(a), 5.29(a)(2)
3.6(c)(1)	5.23(a)(2)
3.6(c)(2)	5.25(a)(2)
3.6(c)(3)	5.23(b)(2)
3.6(c)(4)	5.24(c)(1)
3.6(c)(5)	5.24(b)(2)
3.6(c)(6)	5.25(c)
3.6(d)(1)	5.23(a)(3), 5.25(a)(3)
3.6(d)(2)	5.23(a)(3), 5.25(a)(3)
3.6(d)(3)	5.24(c)(2)
3.6(d)(4)	5.23(b)(3)
3.6(d)(4)(i)	5.23(b)(4)
3.6(d)(4)(ii)	5.23(b)(4)
3.6(d)(4)(iii)	5.25(c)
3.6(e)	5.29(b)
3.7(a)	5.21(a)
3.7(b)	5.31(c)
3.7(c)	5.28
3.7(d)	5.28
3.7(e)	5.28
3.7(f)	5.24(a)
3.7(g)	5.25(b)(1)
3.7(h)	5.28
3.7(i)	5.28
3.7(j)	5.28
3.7(k)	5.28
3.7(l)	5.28
3.7(m)	5.23(b), 5.26(a)(3)
3.7(n)	5.28
3.7(o)	5.26
3.7(p)	5.28
3.7(q)	5.25(a)
3.7(r)	5.23(a)
3.7(s)	5.28

3.7(t)	5.28
3.7(u)	5.28
3.7(v)	5.28
3.7(w)	5.28
3.7(x)	5.27(a), 5.27(b), 5.27(c)
3.7(y)	5.28
3.10	5.523
3.11	5.663
3.12(a)	5.30(a), 5.30(c), 5.37(a) (first sentence)
3.12(b)	5.30(d), 5.33
3.12(c)(1)-(5)	5.31(c)
3.12(c)(6)	5.32, 5.33
3.12(d)	5.30(f)
3.12(e)	5.34(c)
3.12(f)	5.35(b)
3.12(g)	5.35(c), 5.35(d)
3.12(h)	5.36(a)
3.12(i)	5.31(f), 5.36(b), 5.36(c)
3.12(j)	5.31(e)
3.12(k)(1)	5.30(c)
3.12(k)(2)	5.30(e)
3.12(k)(3)	5.30(e)
3.12a(a)(1)	5.39(c)(1)
3.12a(a)(2)	5.39(a), 5.39(d)
3.12a(b)	5.39(a)
3.12a(c)(1)	5.39(b)(1)
3.12a(c)(2)	5.39(b)(2)
3.12a(d)	5.39(d)
3.12a(e)	5.39(f)
3.13(a)	5.37(b)
3.13(b)	5.37(c)
3.13(c)	5.37(d)
3.14(a)	5.38(b)
3.14(b)	5.38(c)
3.14(c)	5.38(b)
3.14(d)	5.30(c)
3.15	5.21(b), 5.39(e)
3.16	No part 5 provision
3.17	No part 5 provision
3.20	5.695
3.21	5.690

3.22(a), 3.22(b), 3.22(c)	5.521
3.22(d)	5.520(b)
3.22(e)	5.522(a), 5.522(b)
3.22(f)	5.522(c)(4)
3.22(g)	5.522(c)(2), 5.522(c)(5), 5.522(d)
3.22(h)	No part 5 provision
3.23(a)	5.370, 5.400, 5.401(b)
3.23(a)(1)	5.400(a)
3.23(a)(2)	5.400(c)
3.23(a)(3)	5.400(b)
3.23(a)(4)	5.400(d)
3.23(a)(5)	5.400(e)
3.23(a)(6)	5.400(g)
3.23(a)(7)	5.400(f)
3.23(b)	5.370, 5.371(d)
3.23(c)	No part 5 provision
3.23(d)(1)	5.416(a), 5.416(b)
3.23(d)(2)	5.390
3.23(d)(3)	5.391
3.23(d)(4)	5.370, 5.410(b)(1), 5.411(a), 5.411(c), 5.416(b), 5.416(c)
3.23(d)(5)	5.370, 5.410(b)(2), 5.411(a), 5.411(c), 5.416(c)
3.23(d)(6)	5.411(a)
3.23(d)(6) (second sentence)	5.411(b)
3.24(a)	5.370, 5.371(a), 5.371(c), 5.411(c)
3.24(b)	5.400, 5.400(h), 5.401(b), 5.414(c)(3)(i), 5.435(a)
3.24(c)	5.435(b)(1), 5.435(b)(2)
3.25	5.536
3.26	No part 5 provision
3.27(a)	5.401(a)
3.27(b)	5.536(b)
3.27(c)	5.589(a), 5.590(a)
3.27(d)	5.580(b)(4)
3.27(e)	5.536(b), 5.401(b)
3.28	5.471
3.29(a)	5.691(b)
3.29(b)	5.421, 5.691(c)
3.29(c)	5.691(b)
3.30 (introduction)	5.425, 5.537
3.30 (except (e))	5.425

3.30(e)	5.537(b)
3.31 (introduction)	5.693(b)
3.31(a)	5.693(a)
3.31(b)	5.693(c), 5.693(c)(1)
3.31(c)	5.693(c)
3.31(c)(1)	5.693(c)(3)
3.31(c)(2)	5.693(c)(8), 5.693(d)
3.31(c)(3)	5.693(c)(4), 5.693(c)(7)
3.31(c)(4)	5.693(c)(5)
3.31(c)(5)	5.693(c)(6)
3.32 (introduction)	5.697(a)
3.32(a)(1)	5.697(a)(1)
3.32(a)(2)	5.697(a)(2)
3.32(b)	5.697(b)
3.40	5.610
3.41	5.611
3.42	5.613
3.43(a)	5.617(a)
3.43(b)	5.617(b)
3.43(c)	5.617(c)
3.50(a)	No part 5 provision
3.50(b) (except (b)(2))	5.201(a), 5.203(b)(1)
3.50(b)(2)	5.203(a)(2)
3.52 (introduction)	5.200(a)
3.52(a)	5.200(b)(1)
3.52(b)	5.200(b)(2)
3.52(c)	5.200(b)(3)
3.52(d)	5.200(b)(4)
3.53(a) (first sentence)	5.201(b) (introduction), 5.201(b)(2)(i)
3.53(a) (second sentence)	5.201(b)(4)
3.53(b) (first sentence)	5.201(b)(5)
3.53(b) (second sentence)	5.201(b)(3)
3.53(b) (last sentence)	5.201(b)(6)
3.54 (introduction)	5.430 (introduction), 5.520(b)(1)(i)
3.54(a)(1)	5.430(a)
3.54(a)(2)	5.430(c)
3.54(a)(3)	5.430(b)
3.54(b)	5.561(b) and (c), except (c)(1)
3.54(c)(1)	5.520(b)(1)(iv)
3.54(c)(2)	5.520(b)(1)(ii)
3.54(c)(3)	5.520(b)(1)(iii)

3.54(d)	5.1 definition of “Child born of the marriage and child born before the marriage”
3.54(e)	5.201(b)(1)
3.55(a)(1)	5.203(c)
3.55(a)(2)	5.203(d)(1)-(3)
3.55(a)(3)	5.203(e)(1) except (e)(1)(iii), 5.203(e)(2)
3.55(a)(4)	No part 5 provision
3.55(a)(5)	5.203(d)(4)
3.55(a)(6)	5.203(e)(1)(iii)
3.55(a)(7)	No part 5 provision
3.55(a)(8)	5.203(d)(4)
3.55(a)(9)	No part 5 provision
3.55(a)(10)(i)	5.203(f)
3.55(a)(10)(ii)	No part 5 provision
3.55(b)	5.228(b)
3.57(a)	5.220 (except 5.220(b)(1))
3.57(a)(1)(ii)	5.220(b)(1)
3.57(a)(1)(iii)	5.220(b)(2), 5.696(a)
3.57(b)	5.226(a), 5.226(b)
3.57(c) (introduction)	5.222(a), 5.222(c), 5.222(d)
3.57(c)(1)	No part 5 provision
3.57(c)(2)	5.223(b)
3.57(c)(3)	No part 5 provision
3.57(d)	5.1 definition of “Custody of a child”
3.57(d)(1)	5.417(a)
3.57(d)(2)	5.417(b), 5.435
3.57(d)(3)	5.417(c), 5.417(d)
3.57(e)(1)	5.225(a)
3.57(e)(2)	5.225(b)(1)
3.57(e)(3)	5.225(d)
3.57(e)(4)	5.225(b)(2)
3.58	5.224(a)
3.59(a)	5.238(a)
3.59(b) (first sentence)	5.238(a)
3.59(b) (second and third sentences)	5.238(d)(1), 5.238(d)(2)(i)
3.60	5.416(a)
3.100	5.5
3.102 (first sentence)	5.4(b)
3.102 (third sentence)	5.3(b)(2)
3.102 (second and seventh sentences)	5.3(b)(3)
3.102 (fourth sentence)	No part 5 provision
3.102 (fifth sentence)	No part 5 provision

3.102 (six sentence)	5.3(b)(5)
3.103(a) (first sentence)	5.83(b)
3.103(a) (second sentence)	5.4(a), 5.4(b)
3.103(a) (last sentence)	No part 5 provision
3.103(b)(1)	5.83(a), 5.83(b)
3.103(b)(2)	5.83(a)
3.103(b)(3)	5.83(c)
3.103(b)(4)	5.84
3.103(c)(1)	5.82(a) (introduction), 5.82(a)(1), 5.82(c), 5.82(d)(1), 5.82(e)(2)
3.103(c)(2)	5.82(b), 5.82(d)(2), 5.82(e)(1)
3.103(d)	5.81
3.103(e)	5.80
3.103(f)	5.83(b)
3.104(a)	5.160(a)
3.104(b)	5.160(b)
3.105 (introduction first sentence)	5.162(a), 5.164, 5.177(c), 5.177(i)
3.105 (introduction second sentence)	5.177(b)
3.105 (introduction last sentence)	5.177(a)
3.105(a) (first and second sentences)	5.162(c)
3.105(a) (third and last sentences)	5.162(f)
3.105(b)	5.163
3.105(c)	5.177(d)
3.105(d) (first and second sentences)	5.175(b)(1)
3.105(d) (third and fourth sentences)	5.175(b)(2)
3.105(d) (fifth through last sentences)	5.83(a), 5.177(c)
3.105(e) (first sentence)	5.313(b) (first sentence)
3.105(e) (second and last sentences)	5.83(a), 5.177(e)
3.105(f) (first sentence)	No part 5 provision
3.105(f) (second and last sentences)	5.83(a), 5.177(f)
3.105(g)	5.83(a), 5.591(b)(5)
3.105(h) (first sentence)	No part 5 provision
3.105(h) (second sentence)	5.83(a)
3.105(h) (last sentence)	5.177(h), 5.705
3.105(i)(1)	5.82(f) (introduction), 5.82(f)(2), 5.82(f)(3), 5.82(f)(4), 5.83(i)(1)(ii)
3.105(i)(2)	5.82(e)(4), 5.82(f)(1), 5.82(f)(5)
3.106(a)	5.683(a), 5.683(b), 5.683(c)
3.106(b)	5.683(e)(1)
3.106(c)	5.683(e)(2)
3.106(d)	5.683(d)(1)
3.106(e)	5.683(d)(2)

3.107	5.525
3.108	5.132(a)
3.109(a)(1) (first sentence)	No part 5 provision
3.109(a) (except (a)(1) first sentence)	5.90(b) (except (b)(2))
3.109(b)	5.99
3.110	5.100
3.112	5.692
3.114	5.152
3.115(a)	5.133(a)
3.115(b)	5.133(c)
3.150	5.50
3.151(a)	5.51
3.151(b)	5.383(c)
3.152	5.52
3.153	5.131(a)
3.154	5.53
3.155	5.54
3.156(a)	5.55
3.156(b)	5.153
3.156(c)	5.165
3.157	5.56
3.158(a)	5.136
3.158(b)	No part 5 provision
3.158(c)	5.712
3.159 (except (a)(1) and (2))	5.90
3.159(a)(1) and (2)	5.1 definition of “Competent evidence”
3.160	5.57
3.161	No part 5 provision
3.200	5.135
3.201(a)	5.131(b)
3.201(b)	5.131(c)
3.202(a)	5.132(b), 5.132(d)
3.202(b)	5.132(c)
3.202(b)(5)	No part 5 provision
3.202(c)	5.132(e)
3.203(a)	5.40(a)
3.203(a)(1)	5.40(c)
3.203(a)(2)	5.40(b)
3.203(a)(3)	5.40(c)
3.203(b)	No part 5 provision
3.203(c)	5.40(d), 5.633(b)(2), 5.643
3.203(c) (last sentence)	5.39(c)(2)
3.204(a)(1)	5.181(b)

3.204(a)(2)	5.181(c)
3.204(b)	5.181(c), 5.229 (introduction)
3.204(c)	5.181(d)
3.205(a)	5.192(c), except (c)(6)(i)
3.205(b) (except last sentence)	5.192(b)
3.205(b) (last sentence)	5.193
3.205(c)	5.200(b)(2)
3.206 (introduction)	5.194(a)
3.206(a)	5.194(b)(1), 5.194(b)(2)
3.206(b)	5.194(c)(1)
3.206(c)	5.194(c)(2)
3.207(a)	5.196(a)(2)
3.207(b)	5.196(b)
3.208	5.373
3.209(a)	5.229(a)
3.209(b)	5.229(b)
3.209(c)	5.229(c)
3.209(d)	5.229(d)
3.209(e)	5.229(e)
3.209(f)	5.229(f)
3.209(g)	5.229(b), 5.229(g)
3.210(a)	5.221
3.210(b)	5.221
3.210(c) (introduction)	5.222(a), 5.222(c), 5.222(d)
3.210(c)(1) (introduction)	5.222(b), 5.224(b)
3.210(c)(1)(i)	5.222(b)
3.210(c)(1)(ii)	5.224(b)
3.210(c)(2)	5.223(a), 5.223(b)(2), 5.223(b)(3)
3.210(d)	5.226(a), 5.226(b)
3.211(a)	5.500(b)
3.211(b)	5.500(d)
3.211(c)	5.500(e)
3.211(d)	5.500(c)
3.211(e) (first sentence)	5.501(b)
3.211(e) (second sentence)	5.501(c)
3.211(f)	5.501(d)
3.211(g)	5.501(d)
3.212(a)	5.502(a), 5.503(b)
3.212(b)	5.502(b), 5.502(c)
3.212(c)	5.502(c)
3.213(a) (first sentence)	5.181(a)
3.213(a)	5.181(b), 5.182(a)

3.213(b) (first sentence)	5.184(d)
3.213(b) (except first sentence)	No part 5 provision
3.213(c)	5.181(c), 5.182(b)
3.214	5.203(a)(1)
3.215	5.203(d)(4)
3.216	5.101(a), 5.101(b)(1), 5.101(b)(2), 5.101(e), 5.101(f)
3.217(a)	5.130(a) (except (a)(3))
3.217(a) (note)	5.130(a)
3.217(b)	5.130(b)
3.250(a)(1)	5.300(a)(1)
3.250(a)(2) (first sentence)	5.300(b) (introduction)
3.250(a)(2) (last sentence)	5.300(b)(2)(i)
3.250(a)(3)	5.300(b)
3.250(b)	5.300(b)(1), 5.300(c)
3.250(b)(1)	5.300(b)(1)(i)
3.250(b)(2)	5.300(b)(2)(ii), 5.302(c)
3.250(c)	5.300(b)(1)(ii)
3.250(d)	5.300(e)
3.251(a)(1)	5.510(d), 5.615(b)
3.251(a)(2)	5.536(c)
3.251(a)(3)	5.615(a), 5.615(b)
3.251(a)(4)	5.536(d)
3.251(a)(5)	5.536(e)
3.251(b)	5.531(a), 5.534(a)
3.252(a)	5.470(a)(4)
3.252(b)	5.470(a)(5)
3.252(c)	5.472(b)(1), 5.472(b)(4)
3.252(d)	5.475(c)
3.252(e)(1)	No part 5 provision
3.252(e)(2)	5.473(c)(1)
3.252(e)(3)	5.473(c)(2)
3.252(e)(4)	5.475(b)(2)(ii)
3.252(f)	No part 5 provision
3.256(a)	5.709(a), 5.709(b)
3.256(b)(1)	5.708(a)(1)
3.256(b)(2)	No part 5 provision
3.256(b)(3)	5.708(b)
3.256(b)(4)	5.708(b)
3.256(c)	5.708(e)(1)
3.257	No part 5 provision
3.260 (introduction)	5.472(b)(4), 5.534(a)

3.260(a)	No part 5 provision
3.260(b)	5.478(a), 5.531(e)
3.260(c)	5.534(b)
3.260(d)	5.534(b)
3.260(e)	No part 5 provision
3.260(f)	5.475(a), 5.475(b), 5.534(b), 5.534(c), 5.536(g)
3.260(g)	5.472(b)(3), 5.691(a)
3.261 (introduction)	(introduction), 5.472(a), 5.706(a)
3.261(a)(1)	No part 5 provision
3.261(a)(2)	No part 5 provision
3.261(a)(3)	5.302(c)
3.261(a)(4)	5.473(d)
3.261(a)(5)	No part 5 provision
3.261(a)(6)	4.472(f)(1), 5.533(b)
3.261(a)(7)	5.304(a), 5.472(f)(8), 5.531(b)(2)(i)
3.261(a)(8)	No part 5 provision
3.261(a)(9)	No part 5 provision
3.261(a)(10)	No part 5 provision
3.261(a)(11)	No part 5 provision
3.261(a)(12)	5.304(c), 5.472(f)(3), 5.533(a)
3.261(a)(13)	5.304(f), 5.472(f)(4), 5.533(f)
3.261(a)(14)	5.706(b)(23)
3.261(a)(15)	5.745(b)(4)
3.261(a)(16)	No part 5 provision
3.261(a)(17)	No part 5 provision
3.261(a)(18)	No part 5 provision
3.261(a)(19)	No part 5 provision
3.261(a)(20)	5.304(d), except (d)(6), 5.304(e), 5.533(c), 5.533(d), 5.472(e), 5.472(f)(7)
3.261(a)(21)	No part 5 provision
3.261(a)(22)	5.304(k), 5.472(c)(3), 5.472(f)(11), 5.532(e), 5.533(p)
3.261(a)(23)	No part 5 provision
3.261(a)(24)	5.303(b)(1)
3.261(a)(25)	No part 5 provision
3.261(a)(26)	5.472(f)(10), 5.531(b)(2)(ii)
3.261(a)(27)	No part 5 provision
3.261(a)(28)	5.304(g)
3.261(a)(29)	No part 5 provision
3.261(a)(30)	No part 5 provision
3.261(a)(31)	5.304(i), 5.472(f)(5), 5.533(j)

3.261(a)(32)	5.706(b)(1)
3.261(a)(33)	5.706(b)(15), 5.706(21)
3.261(a)(34)	5.706(b)(15), 5.706(21)
3.261(a)(35)	5.706(b)(5)
3.261(a)(36)	5.706(b)(3)
3.261(a)(37)	5.706(b)(8) 5.706(b)(9)
3.261(a)(38)	5.412(h), 5.533(k)
3.261(a)(39)	5.706(b)(11)-(13)
3.261(a)(40)	5.706(b)(6)
3.261(a)(41)	5.706(b)(2)
3.261(a)(42)	5.706(b)(24)
3.261(b)(1)	5.474(b), 5.532(d), 5.707(c)
3.261(b)(2)	5.532(c)
3.261(b)(3)	5.474(c)
3.261(b)(4)	5.532(c)
3.261(b)(5)	5.474(d)
3.261(c)	5.706
3.262(a) (introduction)	5.302(a), 5.472(b)(1), 5.531(a)
3.262(a)(1)	5.303(c), 5.472(c)(3), 5.532(e)
3.262(a)(2) (except last sentence)	5.303(a), 5.472(c)(1), 5.532(a)
3.262(a)(2) (last sentence)	5.304(j), 5.472(f)(9), 5.533(o)
3.262(a)(3)	5.472(c)(1), 5.532(a)
3.262(b) (introduction)	5.531(c)
3.262(b)(1)	5.531(c)
3.262(b)(2)	5.473(a), 5.473(b)(2)
3.262(c)	5.472(f)(1), 5.533(b)(1)
3.262(d)	5.472(g)(1), 5.472(h), 5.533(b)(2)
3.262(e) (introduction)	5.472(f)(12) (introduction), 5.533(g) (introduction), 5.533(g)(1), 5.706(b)(23)
3.262(e)(1)	5.472(f)(12)
3.262(e)(2)	5.472(f)(12)
3.262(e)(3)	5.302(a)
3.262(e)(4) (first sentence)	5.533(g) (introduction)
3.262(e)(4) (sentences two through (four)	No part 5 provision
3.262(f)	5.472(f)(12)(ii), 5.472(g)(1), 5.472(g)(2), 5.533(b)(2), 5.533(e), 5.533(g)(5)
3.262(g)(1)	5.533(g)
3.262(g)(2)	5.472(f)(12)(iii)
3.262(h) (first sentence)	5.472(b)(2)(i)
3.262(h) (except first sentence)	5.304(b), 5.472(b)(2)(ii), 5.531(b)(2)(iii)
3.262(i)(1)	5.303(b)

3.262(i)(2)	5.472(f)(12) (introduction), 5.472(f)(12)(iv), 5.533(g) (introduction), 5.533(g)(4)
3.262(j)(1)	5.472(f)(12) (introduction) 5.742(f)(12)(v), 5.533(g) (introduction), 5.533(g)(5)
3.262(j)(2)	5.472(f)(12) (introduction) 5.742(f)(12)(v), 5.533(g) (introduction), 5.533(g)(5)
3.262(j)(3)	5.472(f)(12)(v)
3.262(j)(4)	5.303(b) (introduction), 5.303(b)(1), 5.472(c)(2), 5.532(b), 5.533(g) (introduction), 5.533(g)(6)
3.262(k)(1)	5.302(d), 5.472(d)(1), 5.472(d)(2), 5.472(d)(4), 5.472(g)(3), 5.531(d)(1), 5.531(d)(2), 5.531(d)(4)
3.262(k)(2)	5.302(d), 5.302(e), 5.531(d)(1), 5.531(d)(2), 5.472(d)(1), 5.472(d)(2)
3.262(k)(3)	5.302(e), 5.472(d)(5)
3.262(k)(4)	5.304(h), 5.472(d)(6)
3.262(k)(5)	5.472(d)(7), 5.533(i)
3.262(k)(6)	5.474(d)
3.262(l) (introduction first sentence)	5.474(b)(4), 5.532(d)(4)
3.262(l) (introduction second and third sentences)	No part 5 provision
3.262(l) (introduction fourth sentence)	5.474(b)(1)(ii) (first sentence), 5.532(d)(1)(iii) (first sentence)
3.262(l) (introduction fifth sentence)	5.707(c)(5)
3.262(l) (introduction sixth sentence)	4.474(b)(5), 5.532(d)(5)
3.262(l) (introduction) last sentence	5.474(b)(6), 5.532(d)(6)
3.262(l)(1)	5.474(b)(1)(i)
3.262(l)(2)	5.474(b)(2)
3.262(l)(3)	5.474(b)(3)
3.262(l)(4)	5.532(d)(1)(i)
3.262(m)	No part 5 provision
3.262(n)	5.474(c)
3.262(o)	5.532(c)
3.262(p)	5.474(c)(5), 5.532(c)(3)
3.262(q)	5.706(b)(15), 5.706(21)
3.262(r)	5.472(f)(2)
3.262(s)	5.706(b)(5)
3.262(t) (introduction first sentence)	5.304 (introduction), 5.472 (introduction), 5.533(introduction)
3.262(t) (introduction second sentence)	5.533(h)
3.262(t)(1)	5.533(h)
3.262(t)(2)	5.304(g), 5.472(f)(6)

3.262(u)	5.706(b)(3)
3.262(v)	5.706(b)(8)
3.262(w)	5.533(k)
3.262(x)	5.706(b)(11)
3.262(y)	5.706(b)(6)
3.262(z)	5.706(b)(2)
3.262(aa)	5.706(b)(24)
3.263(a)	5.476(b)
3.263(b)	5.476(a)
3.263(c)	No part 5 provision
3.263(d)	5.476(c)
3.263(e)	5.706(b)(5)
3.263(f)	5.706(b)(3)
3.263(g)	5.706(b)(6)
3.263(h)	5.706(b)(2)
3.263(i)	5.706(b)(24)
3.270	No part 5 provision
3.271(a) (introduction)	5.370(c), 5.410, 5.410(c) (introduction)
3.271(a)(1)	5.410(c)(1)
3.271(a)(2)	5.410(c)(3)
3.271(a)(3)	5.410(c)(2)
3.271(b)	5.410(e)
3.271(c)	5.413(f)
3.271(d)	5.410(f) (except (f)(3))
3.271(e)	No part 5 provision
3.271(f)(1)	5.423(a)
3.271(f)(2)	5.423(b)
3.271(g)	5.413(e)
3.271(h)	5.370(a)
3.272 (introduction first sentence)	5.412 (introduction)
3.272 (introduction last sentence)	5.413(a)
3.272(a)	5.412(b) (introduction), 5.706(b)(18)-(22)
3.272(b)	5.412(b)(1), 5.706(b)(18)-(22)
3.272(c)	5.412(c)(1)
3.272(d)	5.412(d)
3.272(e)	5.412(e)
3.272(f)	5.412(f)
3.272(g) (introduction)	5.413(b) (introduction)
3.272(g)(1) (introduction)	5.413(b) (introduction)
3.272(g)(1)(i)	5.413(b)(2)(i)
3.272(g)(1)(ii)	5.413(b)(2)(i)
3.272(g)(1)(iii)	5.413(b)(1)

3.272(g)(2) (introduction)	5.413(b) (introduction)
3.272(g)(2)(i)	5.413(b)(2)(ii)
3.272(g)(2)(ii)	5.413(b)(2)(ii)
3.272(g)(2)(iii)	5.413(b)(1)
3.272(g)(3)	5.413(b)(1), 5.413(b)(2)(iii)
3.272(h) (introduction)	5.413(c)(1)(i)
3.272(h)(1)(i)	5.413(c)(2)(iv)
3.272(h)(1)(ii)	5.413(c)(1)(i), 5.413(c)(1)(iii), 5.413(c)(2)(ii), 5.413(c)(2)(iii), 5.413(c)(3)
3.272(h)(2)	5.413(c)(2)(i), 5.413(c)(2)(iii)
3.272(i)	5.413(d)
3.272(j)	5.412(a)
3.272(k)(2)	5.706(b), 5.706(b)
3.272(l)	5.412(b), 5.412(b)(3)
3.272(m)	5.411(c)
3.272(n)	5.412(g)
3.272(o)	5.706(b)(5)
3.272(p)	5.706(b)(3)
3.272(q)	5.412(l)(1)
3.272(r)	5.706(b)(8)
3.272(s)	5.412(h)
3.272(t)	5.706(b)(11)
3.272(u)	5.706(b)(6)
3.272(v)	5.706(b)(2)
3.272(w)	5.706(b)(24)
3.272(x)	5.412(l)(8)
3.273 (introduction)	5.421
3.273(a)	5.421
3.273(b)	5.421
3.273(c)	5.410(c)(2)
3.273(d)	5.410(c)(1), 5.410(c)(3)
3.274(a)	5.414(c)(1),5.414(d)(1) (first sentence)
3.274(b)	5.414(e)
3.274(c)	5.414(c)(2), 5.414(d)(1) (first sentence)
3.274(d)	5.414(d)(1) (first sentence), 5.414(e)
3.274(e)	5.414(c)(3)(ii)
3.275(a)	No part 5 provision
3.275(b)	5.414(a)(1), 5.414(b)(1), 5.414(b)(2)
3.275(c)	5.414(a)(2)
3.275(d)	5.414(d) (except (d)(1) (first sentence)
3.275(e)	5.414(b)(3)
3.275(f)	5.706(b)(5)

3.275(g)	5.706(b)(3)
3.275(h)	5.414(b)(4), 5.706(b)(7)
3.275(i)	5.706(b)(6)
3.275(j)	5.706(b)(2)
3.275(k)	5.706(b)(24)
3.276(a)	5.410(d)
3.276(b) (first and second sentences)	5.414(a)(2)(i)
3.276(b) (last sentence)	5.414(a)(2)(ii)
3.277(a)	5.709(a)
3.277(b)	5.182(a), 5.709(a), 5.709(b)
3.277(c)(1)	5.708(a)(1)
3.277(c)(2)	5.708(b)(2)(ii)
3.277(c)(3)	5.708(b) (introduction), 5.708(b)(1), 5.208(b)(2)(i)
3.277(d)	5.708(e)(1)
3.300	5.365
3.301(a)	5.660(a), 5.661(b)(1)
3.301(b)	5.661(b)(2)
3.301(c) (introduction)	No part 5 provision
3.301(c)(1)	5.661(e)
3.301(c)(2)	5.661(c)(1)
3.301(c)(3)	5.661(c)(2)
3.301(d)	5.661(c)(1), 5.661(c)(2), 5.662(a)
3.302	5.661(d)
3.303(a) (first and second sentences)	5.241(a), 5.241(b)
3.303(a) (third sentence)	5.242(a)
3.303(b) (first through third sentences)	5.243(c)
3.303(b) (fifth sentence)	5.243(d)
3.303(c) (first through fifth sentences)	5.244(d)
3.303(c) (last sentence)	5.251(a)
3.303(d)	5.243(b)
3.304(a)	No part 5 provision
3.304(b) (introduction first sentence)	5.244(a)
3.304(b)(1) (first sentence)	5.244(b)(1)
3.304(b)(2)	No part 5 provision
3.304(b)(3)	5.242(b)
3.304(c) (last sentence)	5.91(b), 5.141(a)
3.304(d)	5.249(a)(1)
3.304(e) (first sentence)	5.141(c), 5.141(d)
3.304(e) (last two sentences)	5.141(e)
3.304(f) (introduction)	5.250(a)

3.304(f)(1)	5.250(c)
3.304(f)(2)	5.250(d)
3.304(f)(3)	5.250(e)
3.304(f)(4)	5.250(d)
3.304(f)(5)	5.250(f)
3.305	No part 5 provision
3.306(a)	5.245(a)
3.306(b)	5.245(c)
3.306(b)(1)	5.245(b)(3)
3.306(b)(2)	5.245(b)(4)
3.306(c)	No part 5 provision
3.307(a) (introduction)	5.261(a) (introduction)
3.307(a)(1) (first and second sentences)	5.261(b), 5.265(b)
3.307(a)(1) (last sentence)	5.262(c),5.264(a) (introduction)
3.307(a)(2)	5.265(c)
3.307(a)(3)	5.261(a) (introduction), 5.261(a)(1), 5.261(c) (introduction)
3.307(a)(4)	5.265(a)
3.307(a)(5)	5.264(a) (introduction), 5.264(a)(2)
3.307(a)(6)(i)	5.262(b)
3.307(a)(6)(ii)	5.262(a)(2)
3.307(a)(6)(iii)	5.262(a)(1), 5.262(d)
3.307(a)(6)(iv)	5.262(a)(1), 5.262(d)
3.307(b)	5.260(b), 5.261(c)
3.307(c)	5.260(b)
3.307(d)(1) (first and second sentences)	5.260(c)(1)
3.307(d)(1) (third and last sentences)	5.265(e)
3.307(d)(2)	No part 5 provision
3.308(a)	No part 5 provision
3.308(b)	5.265(f)
3.309(a)	5.261(c) (table)
3.309(b)	5.265(a), 5.265(d)
3.309(c)(1)	5.264(a) (introduction), 5.264(b)
3.309(c)(2)	5.264(c)
3.309(d)(1)	5.268(b)
3.309(d)(2)	5.268(b)
3.309(d)(3)(i)	5.268(a)
3.309(d)(3)(ii)	5.268(c) (introduction)
3.309(d)(3)(ii)(A)	5.268(c)(1) (introduction)
3.309(d)(3)(ii)(B)	5.268(c)(2)
3.309(d)(3)(ii)(C)	5.268(c)(3)
3.309(d)(3)(ii)(D)(*1*)	5.268(c)(4) (introduction)

3.309(d)(3)(ii)(D)(*1*)(*i*)	5.268(c)(4)(i)
3.309(d)(3)(ii)(D)(*1*)(*ii*)	5.268(c)(4)(ii)
3.309(d)(3)(ii)(D)(*2*)	5.268(c)(5)
3.309(d)(3)(ii)(D)(*3*)	5.268(c)(4) (Note)
3.309(d)(3)(ii)(E)	5.268(c)(6)
3.309(d)(3)(iii)	5.268(d)
3.309(d)(3)(iv) (introduction)	5.268(c)(1) (introduction)
3.309(d)(3)(iv)(A)-(D)	5.268(c)(1)(i)-(iv)
3.309(d)(3)(v)	5.268(e)
3.309(d)(3)(vi)	5.268(c)(2)
3.309(d)(3)(vii) (introduction)	5.268(c)(3) (introduction)
3.309(d)(3)(vii)(A)-(D)	5.268(c)(3)(i)-(iv)
3.309(e)	5.262(e)
3.309(e) (Note 2)	5.262(e) (Note 1)
3.309(e) (Note 1)	5.262(e) (Note 2)
3.310(a)	5.246
3.310(b)	5.247
3.310(c)	5.248
3.311(a)(1) (except last sentence)	5.269(c)(1) (introduction first sentence) or NO PART 5
3.311(a)(1) (last sentence)	5.269(c)(2)
3.311(a)(2) (introduction)	5.269(c)(1) (introduction last sentence) 5.269(d)(1)
3.311(a)(2)(i)	5.269(c)(1)(i)
3.311(a)(2)(ii)	5.269(c)(1)(ii)
3.311(a)(2)(iii)	5.269(c)(1)(iii), 5.269(e)(1)
3.311(a)(3)	5.269(e)(2)(ii)
3.311(a)(4)(i)	5.269(c)(4)
3.311(a)(4)(ii)	5.269(c)(3)
3.311(b)(1)	5.269(a) (except first sentence)
3.311(b)(2) (introduction)	5.269(b) (introduction)
3.311(b)(2)(i)-(xxiv)	5.269(b)(1)
3.311(b)(3)	5.269(b)(2)
3.311(b)(4)	5.269(b)(3)
3.311(b)(5)	5.269(b)(1)
3.311(c)(1) (introduction)	5.269(e)(1) (introduction first sentence), 5.269(f)(1)
3.311(c)(1)(i)	5.269(f)(1) (introduction second and last sentence)
3.311(c)(1)(ii)	5.269(f)(3)
3.311(c)(2)	5.269(f)(4) (introduction first sentence)
3.311(c)(3)	5.269(f)(2)

3.311(d)(1)	5.269(f)(4) (introduction second and third sentences)
3.311(d)(2)	5.269(f)(4)(i)-(vi)
3.311(d)(3)	5.269(f)(5), 5.269(f)(6)
3.311(e)	5.269(f)(1)(i)-(vi)
3.311(f)	5.269(g)
3.311(g)	5.269(h)
3.312	5.504
3.313	5.263
3.314	No part 5 provision
3.315(a)	5.220(b)(1)
3.315(b)	5.368
3.315(c)	5.368
3.316(a)	5.267
3.316(b)	5.260(c)
3.317(a)	5.266(a)-(c) (except (c)(3))
3.317(b)	5.266(c)(3)
3.317(c)	5.271(a)-(c)
3.317(d)	5.271(d)
3.317 Table	5.271 Table
3.317(e)(1)	5.266(d)(1)
3.317(e)(2)	5.266(d)(2); 5.271(c)(2)(ii)
3.318	5.270
3.321(a)	5.280(a)
3.321(b)(1)	5.280(b)(1)
3.321(b)(2)	5.380(c)(5)
3.321(b)(3)	5.280(b)(3)
3.321(c)	5.280(c)
3.322	No part 5 provision
3.323(a)	No part 5 provision
3.323(a)(2)	No part 5 provision
3.323(b)	5.380(a)
3.324	5.281
3.326 (introduction)	5.91(a)
3.326(a) (first and second sentences)	5.103(a) (first sentence)
3.326(b)	5.91(a), 5.141(f)
3.326(c)	5.91(a)
3.327(a)	5.102(a), 5.102(b), 5.103(a) (second sentence)
3.327(b)(1) (first sentence)	5.102(c)(3)
3.327(b)(1) (second sentence)	5.102(c)(1)
3.327(b)(2)	5.102(c)(2)

3.327(c)	5.102(d)
3.328	5.92
3.329	Reserved
3.330	5.103(e)
3.331-3.339	Reserved
3.340	5.283
3.341	5.284
3.342(a)	5.380(a)
3.342(b), except (b)(5)	5.380(c)
3.342(b)(5)	No part 5 provision
3.342(c)	No part 5 provision
3.343(a)	5.285(a)
3.343(b)	5.347
3.343(c)	5.285(b)
3.344(a) (first sentence)	5.171(a)
3.344(a) (second sentence)	5.171(d)(5)(i), 5.171(d)(5)(ii)
3.344(a) (third sentence)	5.171(d)(5)(iii)
3.344(a) (fourth sentence)	5.171(d)(1)
3.344(a) (fifth sentence)	5.171(d)(2) (first sentence)
3.344(a) (sixth sentence)	5.171(d)(2) (second sentence)
3.344(a) (seventh sentence)	5.171(c)(2)
3.344(a) (eighth sentence)	No part 5 provision
3.344(a) (ninth sentence)	5.171(d)(6) (first and second sentences)
3.344(a) (last sentence)	5.171(d)(6) (last sentence)
3.344(b)	5.171(e)
3.344(c) (first sentence)	5.171(b)
3.344(c) (second sentence)	No part 5 provision
3.344(c) (last sentence)	5.171(c)(1)
3.350 (introduction)	5.322(a)(1) (introduction)
3.350(a) (introduction first sentence)	5.323(a)
3.350(a) (introduction second sentence)	5.323(b)(1)
3.350(a) (introduction third sentence)	5.323(b)(2)(i)
3.350(a) (introduction last sentence)	5.240(b) (second sentence), 5.323(b)(3)
3.350(a)(1)(i)	5.323(c)(2), 5.232(c)(3)
3.350(a)(1)(ii)	No part 5 provision
3.350(a)(1)(iii)	5.323(c)(6)
3.350(a)(1)(iv)	5.323(c)(7)
3.350(a)(2)(i)	5.322(b), 5.322(c) (introduction)
3.350(a)(2)(i)(a)	5.322(c)(1)-(3)
3.350(a)(2)(i)(b)	5.322(c)(4)
3.350(a)(3)(i)	5.323(d)(1)
3.350(a)(3)(ii)	5.323(d)(2)

3.350(a)(4)	5.322(g)
3.350(a)(5)	5.323(e)
3.350(a)(6)	5.323(f)
3.350(b) (introduction)	5.324 (introduction), 5.324(a)-(e)
3.350(b)(1)	No part 5 provision
3.350(b)(2) (except second sentence)	5.324(c)
3.350(b)(2) (second sentence)	5.322(f)
3.350(b)(3)	5.324(e)
3.350(b)(4) (first sentence)	5.324(d)
3.350(c)(1) (introduction)	5.326 (introduction)
3.350(c)(1)(i)	5.326(a)
3.350(c)(1)(ii)	5.326(b)
3.350(c)(1)(iii)	5.326(e)
3.350(c)(1)(iv)	5.326(g)
3.350(c)(1)(v)	5.326(i)
3.350(c)(2)	5.322(d)
3.350(c)(3)	5.326(i)
3.350(d) (introduction) (first sentence)	5.328 (introduction)
3.350(d) (introduction) (except first sentence)	5.322(e)(1), 5.322(e)(2)
3.350(d)(1)	5.328(a)
3.350(d)(2)	5.328(c)
3.350(d)(3)	5.328(d)
3.350(d)(4)	5.328(e)
3.350(e)(1)	5.330 (introduction)
3.350(e)(1)(i)	5.330(a)
3.350(e)(1)(ii)	5.330(e) (introduction)
3.350(e)(1)(iii)	5.330(b)
3.350(e)(1)(iv)	5.330(c)
3.350(e)(2)	5.330(d)
3.350(e)(3) (first sentence)	5.330(e)(1)
3.350(e)(3) (last sentence)	5.330(e)(2)
3.350(e)(3) (second through fourth sentences)	No part 5 provision
3.350(e)(4)	No part 5 provision
3.350(f)	5.325 (introduction), 5.327 (introduction), 5.329, 5.331(a)
3.350(f)(1)(i)	5.325(a)
3.350(f)(1)(ii)	5.326(c)
3.350(f)(1)(iii)	5.325(b)
3.350(f)(1)(iv)	5.326(d)
3.350(f)(1)(v)	5.327(b)

3.350(f)(1)(vi)	5.325(c)
3.350(f)(1)(vii)	5.327(c)
3.350(f)(1)(viii)	5.326(f)
3.350(f)(1)(ix)	5.327(d)
3.350(f)(1)(x)	5.327(a)
3.350(f)(1)(xi)	5.328(b)
3.350(f)(1)(xii)	5.329
3.350(f)(2) (introduction)	No part 5 provision
3.350(f)(2)(i)	5.325(d)
3.350(f)(2)(ii)	5.326(h)
3.350(f)(2)(iii)	5.327(e)
3.350(f)(2)(iv)	5.331(b)(1)
3.350(f)(2)(v)	5.331(b)(2)
3.350(f)(2)(vi)	5.331(b)(3)
3.350(f)(2)(vii)	5.331(c)
3.350(f)(3)	5.331(d)
3.350(f)(4) (introduction)	5.331(e)(1)
3.350(f)(4)(i)	5.331(d)(2), 5.331(e)(2)
3.350(f)(4)(ii)	5.331(e)(3)
3.350(f)(5)	5.331(f)
3.350(g) (introduction)	5.346(b)(1)(i)
3.350(g)(1)	5.346(b)(1)(i)
3.350(g)(2)	5.346(b)(2)
3.350(h)(1) (first and second sentences)	5.332(b)(1), 5.332(b)(2), 5.332(b)(3)
3.350(h)(1) (last sentence)	5.332(a)
3.350(h)(2)	5.332(a), 5.332(c)(1)(i), 5.322(c)(1)(ii), 5.332(c)(1)(v)
3.350 (h)(3) (first and second sentences)	5.332(b) (introduction), 5.332(c)(1) (introduction)
3.350 (h)(3) (last sentence)	5.332(c)(1) (introduction)
3.350(i) (introduction)	5.333 (introduction)
3.350(i)(1)	5.333(a)
3.350(i)(2)	5.333(b)
3.351(a)(1)	5.390 (introduction), 5.391 (introduction)
3.351(a)(2)	5.321(a)
3.351(a)(3)	5.511(a)
3.351(a)(4)	5.511(c)
3.351(a)(5)	5.390 (introduction), 5.391 (introduction)
3.351(a)(6)	No part 5 provision
3.351(b)	5.511(a)
3.351(c) (introduction)	5.390 (introduction), 5.321(b) (introduction)
3.351(c)(1)	5.321(b)(1), 5.321(b)(2), 5.511(b)

3.351(c)(2)	5.321(b)(3), 5.511(b)(3)
3.351(c)(3)	5.321(c), 5.511(a)
3.351(d)	5.391(a)
3.351(e)	5.511(c)
3.351(f)	5.370, 5.391(b)
3.352(a) (first, sixth, and seventh sentences)	5.320(a)
3.352(a) (second through fourth sentences)	5.320(b)
3.352(a) (fifth sentence)	5.320 (introduction)
3.352(a) (eighth and last sentences)	No part 5 provision
3.352(b)(1) (introduction)	5.332(c) (introduction)
3.352(b)(1)(i)	5.332(c)(1)(i)
3.352(b)(1)(ii)	5.332(c)(1)(ii)
3.352(b)(1)(iii)	5.332(c)(1)(iii), 5.332(c)(1)(iv)
3.352(b)(2) (first sentence)	5.332(c)(2)
3.352(b)(2) (second sentence)	5.332(c)(3)
3.352(b)(2) (third sentence)	5.332(c)(4)
3.352(b)(3)	5.332(c)(5)
3.352(b)(4)	5.332(c)(6)
3.352(b)(5)	No part 5 provision
3.352(c)	5.320(a) (introduction)
3.353	5.790
3.354(a)	5.1 definition of “Insanity”
3.354(b)	5.33
3.355	5.797
3.356(a)	5.227(a)
3.356(b) (introduction first sentence)	5.220 (introduction), 5.220(b) (introduction), 5.220(b)(1)
3.356(b) (introduction second sentence)	5.227(c)(2)(i)
3.356(b) (introduction third sentence)	5.227(b)(2)(ii)
3.356(b)(1)	5.227(b)(1)(i)
3.356(b)(2) (first sentence)	5.227(d)(3)
3.356(b)(2) (last sentence)	5.227(b)(1)(ii)
3.356(b)(3) (except last sentence)	5.227(b)(2)(i), 5.227(c)(1)
3.356(b)(3) (last sentence)	5.227(b)(1)(iv)
3.356(b)(4)	5.227(b)(1)(iii)
3.357	5.367
3.358	No part 5 provision
3.359	5.363

3.360(a)	5.361(a)
3.360(b)	5.361(c)
3.360(c)	5.361(b)
3.361 (except 3.361(a))	5.350
3.361(a)	No part 5 provision
3.362 (except 3.362(a))	5.352
3.362(a)	No part 5 provision
3.363 (except 3.363(a))	5.353
3.363(a)	No part 5 provision
3.370	5.340
3.371	5.341
3.372	5.342
3.373	Reserved
3.374	5.343
3.375	5.344
3.376	Reserved
3.377	Reserved
3.378	5.345
3.379	No part 5 provision
3.380	5.251(e)
3.381(a)	5.360(a)(2)
3.381(b) (first sentence)	5.360(b)
3.381(b) (second sentence)	5.360(c)(3)
3.381(c)	5.360(b)(2)
3.381(d) (first sentence)	5.360(b) (introduction); 5.360(b)(1)
3.381(d) (last sentence)	5.360(d) (introduction)
3.381(e) (introduction)	No part 5 provision
3.381(e)(1)	5.360(d)(1)
3.381(e)(2)	5.360(d)(2)
3.381(e)(3)	5.360(d)(3)
3.381(e)(4)	5.360(d)(4)
3.381(e)(5)	5.360(e)(1)
3.381(e)(6)	5.360(e)(2)
3.381(f) (introduction)	5.360(e) (introduction)
3.381(f)(1)	5.360(e)(3)
3.381(f)(2)	No part 5 provision
3.381(f)(3)	5.360(d)(5)
3.381(f)(4)	5.360(d)(6)
3.381(g)	5.360(d)(7)
3.383(a) (introduction)	5.282(a)
3.383(a)(1)-(5)	5.282(b)

3.383(b)(1)	5.282(c)(1), 5.282(c)(2)
3.383(b)(2)	No part 5 provision
3.383(c)	5.282(c)(3)
3.383(d)	5.282(c)(4)
3.384	5.1 definition of “Psychosis”
3.385	5.366
3.400 (introduction)	5.150(a), 5.383(a)(1)
3.400(a)	No part 5 provision
3.400(b)(1) (introduction)	5.383(a)
3.400(b)(1)(i)	No part 5 provision
3.400(b)(1)(ii)(A)	5.383(a)(1)
3.400(b)(1)(ii)(B)	5.383(c)
3.400(b)(2)	5.311
3.400(c)(1)	5.431(b), 5.538(a)
3.400(c)(2)	5.538(b)
3.400(c)(3)	No part 5 provision
3.400(c)(4)(i)	5.538(c)
3.400(c)(4)(ii)	5.538(d)
3.400(c)(4)(iii)	No part 5 provision
3.400(d)	Reserved
3.400(e) (introduction)	5.782(b)(1)
3.400(e)(1)	5.782(a)
3.400(e)(2)	5.782(b)(3)
3.400(f)	5.752
3.400(g)	5.34(d), 5.35(e), 5.591(a)(4)
3.400(h)(1)	5.150(a), 5.166
3.400(h)(2)	5.55
3.400(h)(3)	No part 5 provision
3.400(h)(4)	No part 5 provision
3.400(i)	5.351
3.400(j)(1)	5.743(a)
3.400(j)(2)	No part 5 provision
3.400(j)(3)	No part 5 provision
3.400(j)(4)	No part 5 provision
3.400(j)(5)	No part 5 provision
3.400(j)(6)	No part 5 provision
3.400(k)	5.167
3.400(l)	No part 5 provision
3.400(m)	No part 5 provision
3.400(n)	5.791(e)
3.400(o)(1) (first sentence)	5.150(a)

3.400(o)(1) (second sentence)	5.150(b)
3.400(o)(2)	5.312(b)
3.400(p)	5.152
3.400(q)(1)	5.153
3.400(q)(2)	5.55(e)
3.400(r)	5.55
3.400(s)	5.683(e)(1)(ii)
3.400(t)	No part 5 provision
3.400(u)	5.235(b)
3.400(v)	5.205
3.400(w)	5.203(b)(3)
3.400(x)	5.790(f)(1)
3.400(y)	5.790(f)(2)
3.400(z)	5.27(c)
3.401(a)(1)	5.335, 5.392
3.401(a)(2)	5.720(f), 5.724(d)
3.401(a)(3)	5.336(a)(1), 5.336(a)(2)
3.401(b)(1)(i)	5.183(b)(1), 5.183(b)(2), 5.183(b)(3)
3.401(b)(1)(ii)	5.183(a)(1)
3.401(b)(2)	5.183(a)(2)
3.401(b)(3)	5.183(b)(4)
3.401(b)(4)	5.183(b)(5)
3.401(c)	No part 5 provision
3.401(d)	5.792(e)
3.401(e)	5.745(e)
3.401(f)	No part 5 provision
3.401(g)	5.346(b)(1)(ii)
3.401(h)	No part 5 provision
3.401(i)	No part 5 provision
3.402 (introduction)	No part 5 provision
3.402(a)	5.538(e)
3.402(b)	No part 5 provision
3.402(c)	5.545(a)
3.402(c)(1)	5.392
3.402(c)(2)	5.545(c)
3.403(a) (introduction)	5.234(a)(1)
3.403(a)(1)	5.234(b)
3.403(a)(2)	5.793
3.403(a)(3)	5.230
3.403(a)(4)	No part 5 provision
3.403(a)(5)	5.183(b)(3)

3.403(b)	5.591(a) (introduction), 5.591(a)(1), 5.591(a)(3)
3.403(c)	5.591(a) (introduction), 5.591(a)(2), 5.591(a)(3)
3.404	5.545(a), 5.545(c)
3.405	5.614
3.450 (except 3.450(a)(1)(ii), 3.450(f), (g))	5.770
3.450(a)(1)(ii)	5.780(a)
3.450(f)	No part 5 provision
3.450(g)	No part 5 provision
3.451	5.771
3.452	5.772
3.453	5.773
3.454(a)	No part 5 provision
3.454(b) (except (b)(2))	5.772(c)
3.458	5.774
3.459	No part 5 provision
3.460 (second sentence of introduction)	No part 5 provision
3.460(a)	No part 5 provision
3.460(b)	5.780(b)(1)
3.460(c)	5.780(b)(2)
3.461(a)	5.781(a)
3.461(b)(1)	5.781(b)
3.461(b)(1) (last sentence)	No part 5 provision
3.461(b)(2)	No part 5 provision
3.461(b)(3)	No part 5 provision
3.500 (introduction)	5.705(a)
3.500(a)	5.591(b) (introduction), 5.705(a)
3.500(b) (introduction)	5.167(a)
3.500(b)(1)	5.167(b)
3.500(b)(2)	5.167(c)
3.500(c)	No part 5 provision
3.500(d)(1)	5.783(a)
3.500(d)(2)	No part 5 provision
3.500(e) (first sentence)	5.743(b)
3.500(e) (second sentence)	5.750(a)(1), 5.751(a)(1)
3.500(e) (third sentence)	5.750(b)(1) (last sentence), 5.751(e)(1) (last sentence)
3.500(f)	5.433(b)(2), 5.434(a)(1)(ii), 5.434(a)(2), 5.434(a)(3), 5.434(b)(1)(ii), 5.434(b)(2)(ii)
3.500(g)(1)	5.694, 5.783(b)(1)

3.500(g)(2)(i)	No part 5 provision
3.500(g)(2)(ii)	5.184(a), 5.314(d), 5.783(b)(2)
3.500(g)(3)	No part 5 provision
3.500(h)	No part 5 provision
3.500(i)	5.743(b)
3.500(j)	No part 5 provision
3.500(k)	5.681(b)(1)
3.500(l)	No part 5 provision
3.500(m)	5.791(e)
3.500(n)(1)	5.197(a), 5.783(b)(1)
3.500(n)(2)(i)	No part 5 provision
3.500(n)(2)(ii)	5.197(b), 5.314(c), 5.783(b)(2)
3.500(n)(3)	5.203(b)(2)
3.500(o)	No part 5 provision
3.500(p)	5.618(b)
3.500(q)	5.683(c)
3.500(r)	5.177(c), 5.177(d), 5.177(e), 5.177(g), 5.591(b)(5)
3.500(s)(1)	5.681(b)(2)
3.500(s)(2)	5.681(b)(3)
3.500(t)	5.712
3.500(u)	5.152
3.500(v)	No part 5 provision
3.500(w)	5.101(c)
3.500(x)	5.743(b), 5.754(d)
3.500(y)	No part 5 provision
3.501 (introduction)	5.705(a)
3.501(a)	5.746(c)
3.501(b)(1)	5.720(b) (introduction third sentence), 5.724(a)(2), 5.728(a)(2)
3.501(b)(2)	5.720(b) (introduction third sentence)
3.501(b)(3)	5.336(b)
3.501(c)	5.711(d)(1)
3.501(d)(1)	No part 5 provision
3.501(d)(2)	5.184(a), 5.477(a) (introduction), 5.477(a)(1)
3.501(e)(1)	5.177(f)
3.501(e)(2)	5.177(e)
3.501(f)	5.313(c)
3.501(g)(1)	5.177(f)
3.501(g)(2)	5.177(e)

3.501(h)	No part 5 provision
3.501(i)(1)	5.727(a)(4)(i) (first sentence)
3.501(i)(2)(i)	5.726(a)(4)
3.501(i)(2)(ii)	No part 5 provision
3.501(i)(2)(iii)	5.726(d)(1)
3.501(i)(3)	5.724(c)
3.501(i)(4)	No part 5 provision
3.501(i)(5)(i)	5.722(a)(3)
3.501(i)(5)(ii)	5.722(d)(1)
3.501(i)(6)	5.723 (except 5.723(d))
3.501(j)	5.792(f)
3.501(k)	No part 5 provision
3.501(m)	No part 5 provision
3.501(n)	No part 5 provision
3.502	5.477(b)
3.502 (introduction)	5.541, 5.705(a)
3.502(a)(1)	No part 5 provision
3.502(a)(2)	No part 5 provision
3.502(b)	5.541
3.502(c)	No part 5 provision
3.502(d)	5.197
3.502(e)(1)	5.545(b)(1)
3.502(e)(2)	No part 5 provision
3.502(f)(1)	5.723(b)
3.502(f)(2)	5.723(c)
3.503(a) (introduction)	5.705(a)
3.503(a)(1)	5.231
3.503(a)(2)	5.774(e)(2)
3.503(a)(3)(i)	5.234(c)(1)
3.503(a)(3)(ii)	5.234(c)(2)
3.503(a)(4)	5.197
3.503(a)(5)	5.696(g)
3.503(a)(6)	5.233
3.503(a)(7)	5.762(c)
3.503(a)(8)	5.764(a)(3) (first sentence)
3.503(a)(9)	5.434
3.503(a)(10)	5.232
3.503(b)	5.591(b)(3)
3.504	5.545(b)(1)
3.505	5.618(c)

3.551(a)	5.720(a), 5.722(b)(1), 5.726(a)(1), 5.726(b)(1), 5.727(b)(1)
3.551(b)(1)	5.727(a)(1), 5.727(a)(3)(i), 5.727(a)(4)(i)
3.551(b)(2)	5.727(c)(1)
3.551(b)(3)	5.727(a)(4)(ii), 5.727(c)(2)
3.551(c)(1)	5.726(a)(1), 5.726(a)(3), 5.726(a)(4)
3.551(c)(2)	5.726(d)(1)
3.551(c)(3)	5.726(c)
3.551(d)	No part 5 provision
3.551(e)	5.722(g)
3.551(e)(1)	5.722(a)(1), 5.722(a)(2), 5.722(a)(3)
3.551(e)(2)	5.722(d)(1)
3.551(e)(3)	5.722(c)
3.551(e)(4)	5.722(e)
3.551(e)(5)	No part 5 provision
3.551(e)(6)	5.722(b)(4)
3.551(f)	5.726(a)(5)
3.551(g)	5.726(a)(2), 5.727(a)(2)
3.551(h)	5.722(f)
3.551(i)	5.723
3.552(a)(1)	5.720(b), 5.720(d), 5.724(b)
3.552(a)(2)	5.720(d), 5.724(b)
3.552(a)(3) (first sentence)	5.720(c)(5)
3.552(a)(3) (second sentence)	5.720(c)(6)
3.552(b)(1)	5.720(b), 5.724(a), 5.728(a)
3.552(b)(2)	5.720(b), 5.720(c)(1)
3.552(b)(3)	5.720(a), 5.720(e), 5.724(c), 5.728(c)
3.552(c)	5.720(b)(1)
3.552(d)	5.720(c)(2)
3.552(e)	5.728(a), 5.728(b)
3.552(e) (third and fourth sentences)	5.724(a)
3.552(f)	5.720(c)(3)
3.552(g)	5.720(c)(3)
3.552(h)	5.720(c)(4)
3.552(i)	5.720(c)(2)
3.552(j)	5.728(a)
3.552(k)	5.720(f), 5.724(d)
3.552(k)(1)	5.726(e)(1)
3.552(k)(2)	5.726(e)(2)
3.552(k)(3)	5.726(e)(2)
3.553	Reserved

3.554	Reserved
3.555	Reserved
3.556(a)	5.720(a), 5.729(a)
3.556(a)(1)	5.730(a)
3.556(b)	5.729(b), 5.730(b)
3.556(c)	5.729(c)
3.556(d)	5.730(d)
3.556(d) (first sentence)	5.729(d)
3.556(d) (third and fourth sentences)	5.729(b)
3.556(e)	5.729(d), 5.730(c)
3.556(f)	5.720(a)
3.557	Reserved
3.558	No part 5 provision
3.559	Reserved
3.650(a) (introduction)	5.544(a)
3.650(a) (last paragraph)	5.544(d)
3.650(a)(1)	5.544(b)(1)
3.650(a)(2)	5.544(b)(2)
3.650(b)	5.544(c)
3.650(c)(1)	5.524(a)(1), 5.524(b), 5.524(c)
3.650(c)(2)	5.524(a), except for (a)(1)
3.650(c)(3)	No part 5 provision
3.651(a)	5.710(a)
3.651(b)	5.710(b)
3.651(c)	5.710(c)
3.652(a)	5.104(a)
3.652(a)(1)	5.104(b), 5.104(c)
3.652(a)(2)	5.104(c)
3.652(b)	5.104(d)
3.653(a)	5.713(a), 5.713(b)(1)
3.653(b)	5.715(b) (introduction), 5.715(b)(1)(iii), 5.715(c), 5.715(d)
3.653(c)	5.714(c), 5.714(d)
3.653(c)(1)	5.714(b), 5.714(e)
3.653(c)(2)	No part 5 provision
3.653(c)(3)	5.715(b)(2), 5.715(d)
3.653(d)	5.715(e)
3.654(a) (first sentence)	5.746(b)
3.654(a) (second sentence)	5.746(a)
3.654(b)(1)	5.746(c)
3.654(b)(2) (first sentence)	5.746(d)(1)

3.654(b)(2) (second sentence)	5.746(d)(4)
3.654(b)(2) (third and fourth sentences)	5.746(d)(2)(ii)
3.654(b)(2) (last sentence)	5.746(d)(5)
3.654(c)	5.746(e)
3.655(a) (first sentence)	5.103(b) (introduction)
3.655(a) (second sentence)	5.103(f) (except last sentence)
3.655(a) (last sentence)	No part 5 provision
3.655(b)	5.103(b)(1), 5.103(b)(2)
3.655(c)(1) (first sentence)	5.103(c), 5.103(d)(1)
3.655(c)(1) (second sentence)	5.103(d)(1)
3.655(c)(1) (last sentence)	5.103(d)(2)
3.655(c)(2)	5.103(d)(3)
3.655(c)(3)	5.103(d)(2), 5.103(d)(5)
3.655(c)(4)	5.103(d)(4)
3.656(a)	5.693(c)(9), 5.711(a), 5.711(b)
3.656(b)	5.711(d)(1)
3.656(c)	5.711(d)(2)
3.656(d)	5.693(c)(9), 5.711(c)
3.657 (introduction)	5.433(a), 5.539(a), 5.540(a)
3.657(a) (introduction)	5.433(b)(1), 5.422(b)(2), 5.539(b)(1), 5.539(b)(2)
3.657(a)(1)	5.433(b)(1), 5.539(b)(1)
3.657(a)(2)	5.433(b)(2), 5.539(b)(2)
3.657(b)	5.434
3.657(b)(1)	5.540(b)
3.657(b)(2)	5.540(c)(1), 5.540(c)(2)
3.658(a)	5.750(a)(1)
3.658(b)	5.761
3.659	5.762(c)
3.659(b)	5.764(a)(3) (second sentence)
3.660(a)(1)	5.182(a), 5.300(d), 5.709(a)
3.660(a)(2)	5.314(b), 5.314(c), 5.314(d), 5.422(a)(2), 5.477(a)
3.660(a)(2) (last sentence)	5.184(a)
3.660(a)(2) (second sentence)	5.543(a)
3.660(a)(2)	5.415
3.660(a)(3)	5.543(b)
3.660(b)	5.422(b), 5.424(a), 5.424(b), 5.424(c)
3.660(b) (introduction)	5.535, 5.542(a)
3.660(b)(1)	5.535, 5.478(b), 5.542(a)
3.660(b)(2)	5.542(b)
3.660(c)	5.422(b)

3.660(c) (first sentence)	5.183(b)(1), 5.183(b)(2), 5.183(b)(3)
3.660(c) (second sentence)	5.183(a)
3.660(d)	5.315, 5.415
3.661(a)(1)	5.708(d)
3.661(a)(2)	5.708(d)
3.661(b)(1)	No part 5 provision
3.661(b)(2)(i)	5.708(e)(3)
3.661(b)(2)(ii)	5.708(g)
3.661(b)(2)(iii)	5.708(f)
3.662	Reserved
3.663	Reserved
3.664	Reserved
3.665(a)	5.810(c), 5.810(e), 5.810(f), 5.811(a), 5.812(a), 5.814(a)(1)
3.665(b)	5.810(a)
3.665(c)	5.811(a), 5.812(a)
3.665(d)(1)	5.811(c)
3.665(d)(2)	5.811(c)
3.665(d)(3)	5.812(b)
3.665(e)	5.814(b)
3.665(f)	5.782(b)(4), 5.814(e)
3.665(g)	5.810(c)
3.665(h)	5.814(a)(2)
3.665(i)	5.815(a)
3.665(i)(1)	5.815(b)
3.665(i)(2)	5.815(c)
3.665(i)(3)	5.815(b), 5.815(c)
3.665(j)	5.811(c)
3.665(j)(3)(ii)	5.811(b)
3.665(k)	5.811(b), 5.812(d)
3.665(l)	5.812(c)
3.665(m)	5.815(d)
3.665(n)(1)	5.817(a)
3.665(n)(2)	5.817(b)
3.665(n)(3)	5.817(b)
3.665(n)(4)	No part 5 provision
3.666 (introduction)	5.810(c), 5.810(e), 5.810(f), 5.813(a)
3.666(a)	5.782(c)
3.666(a)(1)	5.814(c)
3.666(a)(2)	5.814(c)
3.666(a)(3)	5.814(c)

3.666(a)(4)	5.814(e)
3.666(b)(1)	5.814(d)
3.666(b)(2)	5.814(d)
3.666(b)(3)	5.814(e)
3.666(b)(4)	5.814(d)
3.666(c)	5.816
3.666(d)	5.813(b)
3.666(e)(1)	5.817(a)
3.666(e)(2)	5.817(b)
3.666(e)(3)	5.817(b)
3.666(e)(4)	No part 5 provision
3.667(a)(1)	5.696(b)
3.667(a)(2)	5.696(b)
3.667(a)(3)	5.696(c)
3.667(a)(4)	5.696(c)
3.667(a)(5)	5.696(c), 5.696(d)
3.667(b)	5.696(f)
3.667(c)	5.696(g)
3.667(d)	5.696(h)
3.667(e)	5.551(a)
3.667(f)	5.696(i)
3.668	Reserved
3.669(a)	5.676(b)(5), 5.677(b)(5), 5.678(b)(2)(i), 5.681(a)(1)
3.669(b)	5.681(a)(2)
3.669(b)(1)	5.676(b)(5)
3.669(b)(1) (last sentence)	5.681(b)(1)
3.669(b)(2)	5.677(b)(5)
3.669(b)(2) (last sentence)	5.681(b)(2)
3.669(c) (first sentence)	5.678(b)(2)(ii)
3.669(c) (last sentence)	5.681(b)(3)
3.669(d)(1)	5.676(c)(1), 5.677(c)(1), 5.682(b), 5.682(c)
3.669(d)(2)	5.682(d)
3.700 (introduction)	5.756
3.700(a)(1)(i)	5.746(b)
3.700(a)(1)(ii)	5.24(c)(3), 5.746(a)
3.700(a)(1)(iii)	5.746(e)
3.700(a)(2)(i)	No part 5 provision
3.700(a)(2)(ii)	No part 5 provision
3.700(a)(2)(iii) (first sentence)	5.747(a)(1)
3.700(a)(2)(iii)	5.747(d)

3.700(a)(2)(iv)	5.747(a)(2)
3.700(a)(3)	5.747(b), 5.747(d)
3.700(a)(4)	5.464
3.700(a)(5)(i)	5.747(d)
3.700(a)(5)(i) (first sentence)	5.747(c)(1)
3.700(a)(5)(ii)	5.747(c)(2)
3.700(b)(1)	5.761
3.700(b)(2)	5.762(a), 5.762(b)
3.700(b)(3)	5.765
3.701(a) (first and fourth sentences)	5.757(e)(1)
3.701(a) (first and third sentences)	5.757(d)
3.701(a) (first and second sentences)	5.757(a), 5.757(b)
3.701(a) (fifth sentence)	5.757(e)(3), 5.758(d)
3.701(a) (sixth and seventh sentences)	No part 5 provision
3.701(a)	5.757(c)
3.701(b)	5.740(a)
3.701(c)	5.757(f)
3.702(a)	5.759(a)(1)(i), 5.759(a)(2)
3.702(b)	No part 5 provision
3.702(c)	5.759(b)
3.702(d)(1)	5.759(a)(1)(ii)
3.702(d)(1) (second sentence)	5.742(a), 5.742(c)
3.702(d)(2)	5.760
3.702(e)	No part 5 provision
3.702(f)	No part 5 provision
3.703	5.762(c)
3.703(c)	5.764(a)
3.704(a)	5.763
3.704(b)	5.536(h)
3.705	Reserved
3.706	Reserved
3.707	5.764(b), 5.764(c), 5.764(d)
3.707(a)	5.764(a)
3.708(a)(1)	5.750(a)(1)
3.708(a)(2)	5.750(a)(2)
3.708(a)(3)	5.750(b), 5.751(e)
3.708(a)(4)	5.750(a)(1)
3.708(b)(1) (first sentence)	5.751(a)(1)
3.708(b)(1) (second and third sentences, excluding intervening cross reference)	5.751(c)
3.708(b)(1) (second sentence)	5.751(a)(2)

3.708(b)(1) (last sentence)	5.751(e)
3.708(b)(2)	5.751(b)
3.710	5.753
3.711	5.461(a), 5.461(b), 5.461(c)
3.711 (first sentence)	5.758(a)
3.711 (second sentence)	5.742(a)
3.711 (last sentence)	5.758(b)
3.712(a)	No part 5 provision
3.712(b)	No part 5 provision
3.713(a)	5.463
3.713(b)	No part 5 provision
3.714	No part 5 provision
3.715	5.754(b), 5.754(c)
3.750	5.745
3.750(d)(2)	5.740(d)
3.751	No part 5 provision
3.752	Reserved
3.753	5.748
3.754	No part 5 provision
3.800	No part 5 provision
3.801(a)	5.581(a), 5.581(b)
3.801(b)	5.581(d)
3.801(c)(1)	5.581(f)
3.801(c)(2)	5.581(c)(1)
3.801(d)	5.581(c)(2)
3.801(e)	5.581(e)(1)
3.802(a)	5.580(a)
3.802(b)	5.580(b)(1), 5.580(b)(2), 5.580(c), 5.580(d)
3.802(c)	5.580(b)(3)
3.803	5.582
3.803(d)	5.554
3.804	5.583
3.805	5.584
3.806	5.585
3.807(a)	No part 5 provision
3.807(b)	No part 5 provision
3.807(c)	5.586(b), 5.586(c)
3.807(d)	No part 5 provision
3.808(a)	5.603(c)(1)
3.808(b)	5.603(c)(1), 5.603(c)(2)
3.808(c)	5.603(d)(1), 5.603(e)

3.808(d)	5.603(d)(3)
3.808(e)	5.603(b)(1)
3.809	5.604
3.809a	5.605
3.810(a) (introduction)	5.606(b), 5.606(c)
3.810(a)(1)	5.606(b)(1), 5.606(c)(1), 5.606(c)(2)
3.810(a)(2)	5.606(b)(2), 5.606(b)(3), 5.606(c)(1), 5.606(c)(2)
3.810(b)	5.606(d)
3.810(c)(1)	5.606(e)(1)
3.810(c)(2)	5.606(e)(2)
3.810(d)	5.606(f)
3.811	5.587
3.812	5.588
3.813	No part 5 provision
3.814	5.589
3.814(b)	Reserved
3.814(e) (introduction)	5.591(a) (introduction)
3.814(e)(1)	5.591(a)(5)
3.814(e)(2)	5.591(a)(4)
3.814(f)	5.591(b) (introduction)
3.814(f) (introduction)	5.591(b)(4)
3.814(f)(1)	5.591(b)(1)
3.814(f)(2)	5.591(b)(2)
3.815(a)-(h)	5.590
3.815(i) (introduction)	5.591(a) (introduction), 5.591(a)(2), 5.591(a)(6)
3.815(i)	5.591(a)(3)
3.815(i)(1)	5.591(a)(5)
3.815(i)(2)	5.591(a)(4)
3.815(j) (introduction)	5.591(b)(4)
3.815(j)	5.591(b) (introduction)
3.815(j)(1)	5.591(b)(1)
3.815(j)(2)	5.591(b)(2)
3.816	5.592
3.850(a)	5.791(a)
3.850(b)	5.791(c)
3.850(c)	5.791(b)
3.850(d)	5.791(d)
3.851	No part 5 provision
3.852(a)	5.792(a)
3.852(b)	5.792(b)

3.852(c)	5.792(d)
3.852(d) (first sentence)	5.792(b)
3.852(d) (second sentence)	5.792(c)
3.853(a), 3.853(b)	No part 5 provision
3.853(c)	5.798
3.854	5.793(a)
3.855	5.794
3.856	5.795
3.857	5.796
3.900(a)	5.675(a)
3.900(b)(1)	No part 5 provision
3.900(b)(2)	5.676(b), 5.676(c), 5.677(b), 5.677(c), 5.678(b)(3)
3.900(c)	5.675(b)
3.900(d)	No part 5 provision
3.901(a)	5.1 definition of “Fraud,” 5.676(a)
3.901(b)	5.676(b)(2)
3.901(c)	5.676(c)(2)(i)
3.901(d)	5.676(b)(1)
3.901(d) (last sentence)	5.676(b)(3)(i)
3.901(e)	5.680(c)(1), 5.680(c)(2)
3.902(a)	5.677(a)
3.902(b)	5.677(b)(2)
3.902(c)	5.677(c)(2)
3.902(d)	5.677(b)(1)
3.902(d) (last sentence)	5.677(b)(3)(i)
3.902(e)	5.677(d)
3.903(a)(1)	5.678(a)(2)
3.903(a)(1)	5.678(a)(2)
3.903(a)(3)	5.678(a)(1)
3.903(a)(4)	5.678(a)(4)
3.903(a)(5)	5.678(a)(5)
3.903(b)(1)	5.678(b)(3)(i), 5.678(b)(3)(ii), 5.678(b)(3)(iv)
3.904(b) (last sentence)	5.677(b)(2)
3.903(b)(2)	5.678(b)(1)
3.903(c)	5.682(a)
3.904(a)	5.676(d)
3.904(b) (last sentence)	5.677(b)(3)(ii)
3.904(b)	5.677(c)(2)
3.904(c) (first sentence)	5.678(b)(3)(iv)
3.904(c) (last sentence)	5.678(c)(2)

3.905(a)	5.679(a), 5.680(a)
3.905(b)	5.679(b), 5.679(c)(2)
3.905(c)	5.679(c)(1)
3.905(d)	5.679(d), 5.679(e)
3.905(e)	5.680(c)(3)
3.950	No part 5 provision
3.951	5.170(a)
3.951(a)	5.173
3.951(b) (first sentence)	5.172(a)
3.951(b) (second sentence)	5.172(b)
3.951(b)	5.170(b)
3.952	No part 5 provision
3.953(a)	5.174(a)
3.953(b)	No part 5 provision
3.953(c)	5.174(b)
3.954	5.653
3.955	Reserved
3.956	Reserved
3.957	5.170(a), 5.170(b)
3.957 (first sentence)	5.175(a)(1)
3.957 (last sentence)	5.175(a)(2)
3.958	5.751(a)(2)
3.959	5.346(a)
3.960(a)	5.461(d), 5.474(a), 5.758(c)
3.960(b)	5.470(a)
3.960(c)	5.470(c)
3.960(d)	5.470(b), 5.478(c)
3.1000(a) introductory text	5.1 definition of “Accrued benefits”
3.1000(a)(1)	5.551(b), 5.551(c)
3.1000(a)(2)	5.551(d)
3.1000(a)(3)	5.551(e)
3.1000(a)(4)	5.551(e)
3.1000(a)(5)	5.551(f)
3.1000(b)	5.784
3.1000(b)(1)	5.784(b)(1)
3.1000(b)(2)	5.784(a)
3.1000(b)(3)	5.784(b)(2)
3.1000(c)	5.552
3.1000(c)(1)	5.553
3.1000(c)(2)	5.551(g)
3.1000(d)(1)	5.551(c), 5.566(d)

3.1000(d)(2)	5.551(a), 5.551(e), 5.566(d)
3.1000(d)(3)	5.551(a), 5.566(d)
3.1000(d)(4)	5.1 definition of “Evidence in the file on the date of death”
3.1000(d)(5)	5.1 definition of “Evidence in the file on the date of death”
3.1000(e)	5.554
3.1000(f)	5.551(d), 5.554
3.1000(g)	5.554
3.1000(h)	5.554
3.1001	5.567
3.1001(b)(1)	No part 5 provision
3.1002	5.551(f)
3.1003 (introduction)	5.564(a)(1)
3.1003(a)	5.564(a)(1)
3.1003(a)(1)	5.564(a)(1)
3.1003(a)(2)	5.564(b)
3.1003(b)	5.564(a)(1)
3.1003(c)	5.564(c)
3.1004	Reserved
3.1005	Reserved
3.1006	Reserved
3.1007	5.568
3.1008	5.565(d)(2)
3.1009 (introduction)	5.566(a)
3.1009(a)	5.566(d)
3.1009(b)	5.566(e)
3.1600 (first sentence)	5.631(a), 5.631(b)
3.1600(a)	5.638(a)
3.1600(b)(1)	5.643
3.1600(b)(2)	5.643
3.1600(b)(3)	5.636
3.1600(b)(4)	5.643
3.1600(c)	5.644(a), 5.644(b)(1)-(4)
3.1600(d)	5.631(a)
3.1600(e)	No part 5 provision
3.1600(f)	5.645(b)
3.1600(g)	5.638(c)(1), 5.639(a), 5.639(c)
3.1601(a)	5.633(a)
3.1601(a)(1)	5.632
3.1601(a)(2)	5.632

3.1601(a)(2)(iii) (second and third sentences)	5.649(d)
3.1601(a)(3)	5.645(c)
3.1601(b)	5.633(b)
3.1601(b)(5)	5.636
3.1602(a)	5.649(b), 5.649(e)
3.1602(b)	5.649(a)
3.1602(c)	5.649(c)
3.1602(d)	5.650
3.1603	5.636
3.1604(a)	5.651(a), 5.651(b)
3.1604(a)(1)	5.651(d)
3.1604(a)(2)	5.651(a), 5.651(b)
3.1604(b)(1)	5.651(c)(1)
3.1604(b)(2)	5.651(c)(1)
3.1604(b)(3)	5.651(c)(2)
3.1604(c)	5.651(a), 5.651(b)
3.1604(d)	5.645(a)
3.1604(d)(1)(i)-(iv)	5.645(a)
3.1604(d)(1)(v)	No part 5 provision
3.1604(d)(2) (first sentence)	No part 5 provision
3.1604(d)(3)	5.645(a)
3.1604(d)(4)	5.649(a)
3.1605 (introduction)	5.644(a)
3.1605(a)	5.644(b)(5), 5.644(c)
3.1605(a)(3) (last sentence)	5.616
3.1605(b)	5.644(d)
3.1605(c)	No part 5 provision
3.1605(d)	5.644(b)(6)
3.1605(e)	No part 5 provision
3.1606	5.635
3.1607	5.634(b)(1)
3.1608	5.634(b)(2), 5.634(b)(3)
3.1609	5.652
3.1610(a)	No part 5 provision
3.1610(b)	5.636
3.1611	No part 5 provision
3.1612	No part 5 provision
3.2100	5.0
3.2130	5.134
3.2600	5.161

APPENDIX B TO PART 5 - DERIVATION OF PART 5 PROVISIONS

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Subpart A – General Provisions		
5.0(a)	3.2100	Scope of applicability.
5.0(b)	New	
5.1 definition of “Accrued benefits”	3.1000(a) introductory text	General definitions.
5.1 definition of “Active military service”	New	
5.1 definition of “Agency of original jurisdiction”	New	
5.1 definition of “Alien”	New	
5.1 definition of “Application”	New	
5.1 definition of “Armed Forces”	3.1(a)	
5.1 definition of “Beneficiary”	New	
5.1 definition of “Benefit”	New	
5.1 definition of “Certified statement”	New	
5.1 definition of “Child born of the marriage and child born before the marriage”	3.54(d)	
5.1 definition of “Claim”	3.1(p)	
5.1 definition of “Claim for benefits pending on the date of death”	3.1000(d)(5)	
5.1 definition of “Claimant”	New	
5.1 definition of “Competent evidence”	3.159(a)(1), 3.159(a)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.1 definition of “Custody of a child”	3.57(d)	
5.1 definition of “Direct service connection”	New	
5.1 definition of “Discharged or released from active military service”	3.1(h)	
5.1 definition of “Drugs”	New	
5.1 definition of “Effective the date of the last payment”	New	
5.1 definition of “Evidence on file on the date of death”	3.1000(d)(4)	
5.1 definition of “Final decision”	New	
5.1 definition of “Fraud”	3.1(aa), 3.901(a)	
5.1 definition of “Insanity”	3.354(a)	
5.1 definition of “Nonservice-connected”	3.1(l)	
5.1 definition of “Notice”	3.1(q)	
5.1 definition of “Nursing home”	3.1(z)	
5.1 definition of “Payee”	New	
5.1 definition of “Political subdivision of the U.S.”	3.1(o)	
5.1 definition of “Proximately caused”	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.1 definition of “Psychosis”	3.384	
5.1 definition of “Reserve” or “reservist”	3.1(c)	
5.1 definition of “Reserve component”	3.1(b)	
5.1 definition of “Secretary concerned”	3.1(g)	
5.1 definition of “Service-connected”	3.1(k)	
5.1 definition of “Service treatment records”	New	
5.1 definition of “State”	3.1(i)	
5.1 definition of “Uniformed services”	New	
5.1 definition of “VA”	1.9(b)(1)	
5.1 definition of “Veteran”	3.1(d)	
5.1 definition of "Willful misconduct"	3.1(n)	
5.2	New	Terms and usage in part 5 regulations.
5.3(a)	New	Standards of proof.
5.3(b)(1)	New	
5.3(b)(2)	3.102 (third sentences)	
5.3(b)(3)	3.102 (second and seventh sentences)	
5.3(b)(4)	New	
5.3(b)(5)	3.102 (sixth sentence)	
5.3(b)(6)	New	
5.3(c), 5.3(d), 5.3(e)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.4(a)	3.103(a) (second sentence)	Claims adjudication policies.
5.4(b)	3.102 (first sentence), 3.103(a) (second sentence)	
5.5	3.100	Delegations of authority.
5.6-5.19		Reserved
Subpart B – Service Requirements for Veterans		
Periods of War and Types of Military Service		
5.20	3.1(e), 3.1(f), 3.2	Dates of periods of war.
5.21(a)	3.6(a), 3.7(a)	Service VA recognizes as active military service.
5.21(b)	3.15	
5.22(a)	3.6(b)(1)	Service VA recognizes as active duty.
5.22(b)	3.6(b)(7)	
5.22(c)	New	
5.23(a)	3.7(r)	How VA classifies Reserve and National Guard duty.
5.23(a)(1)	3.6(b)(1)	
5.23(a)(2)	3.6(c)(1)	
5.23(a)(3)	3.6(d)(1), 3.6(d)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.23(b)	3.7(m)	
5.23(b)(1)	3.6(b)(1)	
5.23(b)(2)	3.6(c)(3)	
5.23(b)(3)	3.6(d)(4)	
5.23(b)(4)	3.6(d)(4)(i), 3.6(d)(4)(ii)	
5.23(c)	New	
5.24(a)	3.6(b)(4), 3.6(b)(7), 3.7(f)	How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.
5.24(b)(1)	3.6(b)(5)	
5.24(b)(2)	3.6(c)(5)	
5.24(c)(1)	3.6(c)(4)	
5.24(c)(2)	3.6(d)(3)	
5.24(c)(3)	3.700(a)(1)(ii)	
5.24(d)	New	
5.25(a)	3.7(q)	How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor
5.25(a)(1)	3.6(b)(2)	
5.25(a)(2)	3.6(c)(2)	
5.25(a)(3)	3.6(d)(1), 3.6(d)(2)	
5.25(b)	3.6(b)(3)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.25(b)(1)	3.7(g)	agencies, and of temporary members of the Coast Guard Reserve.
5.25(c)	3.6(d)(4)(iii)	
5.25(d)	New	
5.26	3.7(o)	Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.
5.26(a)(3)	3.7(m)	
5.27(a), 5.27(b)	3.7(x)	Individuals and groups designated by the Secretary of Defense as having performed active military service.
5.27(c)	3.7(x), 3.400(z)	
5.28	3.7(c)-(e), 3.7(h)-(l), 3.7(n), 3.7(p), 3.7(s)-(w), 3.7(y).	Other groups designated as having performed active military service.
5.29(a)(1)	3.6(b)(6)	Circumstances under which certain travel periods may be
5.29(a)(2)	3.6(b)(7)	
5.29(a)(3)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.29(b)	3.6(c)(6), 3.6(e)	classified as military service.
5.30(a)	3.12(a) (first sentence)	How VA determines if service qualifies for VA benefits.
5.30(b)	New	
5.30(c)	3.12(a) (second sentence), 3.12(k)(1), 3.14(d)	
5.30(d)	3.12(b)	
5.30(e)	3.12(k)(2), 3.12(k)(3)	
5.30(f)	3.12(d)	
Bars to Benefits		
5.31(a)	New	Statutory bars to VA benefits.
5.31(b)	New	
5.31(c)	3.7(b), 3.12(c)(1)-(5)	
5.31(d)	New	
5.31(e)	3.12(j)	
5.31(f)	3.12(i)	
5.32	3.12(c)(6)	Consideration of compelling circumstances when veteran was separated for AWOL.

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.33	3.12(b), 3.354(b)	Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for VA benefits.
Military Discharges and Related Matters		
5.34(a)	New	Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.
5.34(b)	New	
5.34(c)	3.12(e)	
5.34(d)	3.400(g)	
5.35(a)	New	Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.
5.35(b)	3.12(f)	
5.35(c), 5.35(d)	3.12(g)	
5.35(e)	3.400(g)	
5.36(a)	3.12(h)	Effect of certain special discharge upgrade
5.36(b), 5.36(c)	3.12(i)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		programs on eligibility for VA benefits.
5.37(a) (first sentence)	3.12(a)	Effect of extension of service obligation due to change in military status on eligibility for VA benefits.
5.37(a) (second sentence)	New	
5.37(b)	3.13(a)	
5.37(c)	3.13(b)	
5.37(d)	3.13(c)	
5.38(a)	New	Effect of a voided enlistment on eligibility for VA benefits.
5.38(b)	3.14(a), 3.14(c)	
5.38(c)	3.14(b)	
5.39(a)	3.12a(a)(2), 3.12a(b)	Minimum active duty service requirement for VA benefits.
5.39(b)(1)	3.12a(c)(1)	
5.39(b)(2)	3.12a(c)(2)	
5.39(c)(1)	3.12a(a)(1)	
5.39(c)(2)	3.203(c) (last sentence)	
5.39(d)	3.12a(a)(2), 3.12a(d)	
5.39(e)	3.15	
5.39(f)	3.12a(e)	
5.40(a)	3.203(a)	Service records as evidence of service and character of discharge
5.40(b)	3.203(a)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.40(c)	3.203(a)(1), 3.203(a)(3)	that qualify for VA benefits.
5.40(d)	3.203(c)	
5.41-5.49		Reserved
Subpart C – Adjudicative Process, General		
VA Benefit Claims		
5.50	3.150	Applications VA Furnishes.
5.51	3.151(a)	Filing a claim for disability benefits.
5.52	3.152	Filing a claim for death benefits.
5.53	3.154	Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.
5.54	3.155	Informal claims.
5.55	3.156(a), 3.400 introductory text	Claims based on New and material evidence.

Part 5 Provision	Part 3 Provision	Part 5 Section Title
	3.400(h)(2), 3.400(q)(2), 3.400(r)	
5.56	3.157	Report of examination, treatment, or hospitalization as a claim.
5.57	3.160	Claims definitions.
5.58-5.79		Reserved
Rights of Claimants and Beneficiaries		
5.80	3.103(e)	Right to representation.
5.81	3.103(d)	Submission of information, evidence, or argument.
5.82(a) (introduction)	3.103(c)(1) (first sentence)	Right to a hearing.
5.82(a)(1)	3.103(c)(1)	
5.82(a)(2)	New	
5.82(b)	3.103(c)(2)	
5.82(c)	3.103(c)(1)	
5.82(d)(1)	3.103(c)(1)	
5.82(d)(2)	3.103(c)(2)	
5.82(d)(3)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.82(e)(1)	3.103(c)(2)	
5.82(e)(2)	3.103(c)(1)	
5.82(e)(3)	New	
5.82((e)(4)	New	
5.82(f)(1)	3.105(i)(2)	
5.82(f)(2)	3.105(i)(1)	
5.82(f)(3)	3.105(i)(1)	
5.82(f)(4)	3.105(i)(1)	
5.82(f)(5)	3.105(i)(2)	
5.83(a)	3.103(b)(1), 3.103(b)(2), 3.105(d)-(h)	Right to notice of decisions and proposed adverse actions.
5.83(b)	3.103(a), 3.103(b)(1), 3.103(f)	
5.83(c)	3.103(b)(3)	
5.84	3.103(b)(4)	Restoration of benefits following adverse action.
5.85-5.89		Reserved
Duties of VA		
5.90 (except (b)(3))	3.159	VA assistance in developing claims.
5.90(b)(3)	3.109(a)(1)	
5.91(a)	3.326(b), 3.326(c)	Medical evidence for disability claims.
5.91(b)	3.304(c) (last sentence)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.92	3.328	Independent medical opinions.
5.93	New	Service records which are lost, destroyed, or otherwise unavailable.
5.94-5.98		Reserved
Responsibilities of Claimants and Beneficiaries		
5.99	3.109(b)	Extensions of time limits for providing information or evidence.
5.100	3.110	Time limits for claimant or beneficiary responses.
5.101(a)	3.216	Requirement to provide Social Security numbers.
5.101(b)	3.216	
5.101(c)	3.500(w)	
5.101(d)	New	
5.101(e)	3.159(b)(1), 3.216	
5.101(f)	3.216	
5.102(a)	3.327(a) (except third sentence)	Reexamination requirements.
5.102(b)	3.327(a) (third sentence)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.102(c)(1)	3.327(b)(1) (second sentence)	
5.102(c)(2)(i)	3.327(b)(2)	
5.102(c)(3)	3.327(b)(1) (first sentence)	
5.102(d)	3.327(c)	
5.103(a) (first sentence)	3.326(a) (first and second sentences)	Failure to report for VA examination or reexamination.
5.103(a) (second sentence)	3.327(a) (first sentence)	
5.103(a) (third sentence)	New	
5.103(b) (introduction)	3.655(a) (first sentence)	
5.103(b)(1)	3.655(b)	
5.103(b)(2)	3.655(b)	
5.103(c)	3.655(c)(1) (first sentence)	
5.103(d)(1)	3.655(c)(1) (first and second sentences)	
5.103(d)(2)	3.655(c)(1) (last sentence), 3.655(c)(3)	
5.103(d)(3)	3.655(c)(2)	
5.103(d)(4)	3.655(c)(4)	
5.103(d)(5)	3.655(c)(3)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.103(e)	3.330	
5.103(f) (except last sentence)	3.655(a) (second sentence)	
5.103(f) (last sentence)	New	
5.104(a)	3.652(a)	Certifying continuing eligibility to receive benefits.
5.104(b)	3.652(a)(1)	
5.104(c)	3.652(a)(1), 3.652(a)(2)	
5.104(d)	3.652(b)	
5.105-5.129		Reserved
General Evidence Requirements		
5.130(a) (except (a)(3))	3.217(a), 3.217(a) (note)	Submission of statements, evidence, or information affecting entitlement to benefits.
5.130(a)(3)	3.217(b)	
5.130(b)	3.217(b)	
5.130(c)	New	
5.131(a)	3.153	Applications, claims, and exchange of evidence with Social Security Administration – death benefits.
5.131(b)	3.201(a)	
5.131(c)	3.201(b)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.132(a)	3.108	Claims, statements, evidence, or information filed or submitted abroad; authentication of documents from foreign countries.
5.132(b)	3.202(a)	
5.132(c)	3.202(b)	
5.132(d)	3.202(a)	
5.132(e)	3.202(c)	
5.133(a)	3.115(a)	Information VA may request from financial institutions.
5.133(b)	New	
5.133(c)	3.115(b)	
5.134	3.2130	VA acceptance of signature by mark or thumbprint.
5.135	3.200	Statements certified or under oath or affirmation.
5.136	3.158(a)	Abandoned claims.
5.137-5.139		Reserved
Evidence Requirements for Former Prisoners of War (POWs)		
5.140	3.1(y)	Determining former prisoner of war status.
5.141(a)	3.304(c)	Medical evidence for

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.141(b)	New	former prisoner of war disability compensation claims.
5.141(c)	3.304(e)	
5.141(d)	3.304(e) (first sentence)	
5.141(e)	3.304(e) (last two sentences)	
5.141(f)	3.326(b)	
5.142-5.149		Reserved
General Effective Dates for Awards		
5.150(a)	3.400 (introduction), 3.400(a), 3.400(h)(1), 3.400(o)(1) (first sentence), 3.400(q)(2)	General effective dates for awards or increased benefits.
5.150(b)	3.400(o)(1) (second sentence)	
5.150(c)	New	
5.151	3.1(r)	Date of receipt.
5.152	3.114	Effective dates based on change of law or VA issue.
5.153	3.156(b), 3.400(q)(1)	Effective date of awards based on receipt of evidence prior to end of

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		appeal period or before a final decision.
5.154-5.159		Reserved
General Rules on Revision of Decisions		
5.160(a)	3.104(a)	Binding effect of VA decisions.
5.160(b)	3.104(b)	
5.161	3.2600	Review of benefit claims decisions.
5.162(a)	3.105 introductory text (first sentence)	Revision of agency of original jurisdiction decisions based on clear and unmistakable error.
5.162(b)	New	
5.162(c)	3.105(a) (first two sentences)	
5.162(e)	New	
5.162(f)	3.105(a) (third and last sentences)	
5.163	3.105(b)	Revision of decisions based on difference of opinion.
5.164	New	Standard of proof for reducing or discontinuing a benefit

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		payment or for severing service connection based on a beneficiary's act of commission or omission.
5.165	3.156(c)	Keep phrase "reducing or discontinuing" in same order in each use. Check and correct tables of contents.
5.166	3.400(h)(1)	Effective dates for revision of decisions based on difference of opinion.
5.167(a)	3.500(b) introductory text	Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on commission or omission, or based on administrative error.
5.167(b)	3.500(b)(1)	
5.167(c)	3.500(b)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.168		Reserved
5.169		Reserved
General Rules on Protection or Reduction of Existing Ratings		
5.170(a)	New	Calculation of 5-year, 10-year, and 20-year protection periods.
5.170(b)	3.951(b), 3.957	
5.170(c)	New	
5.170(d)	New	
5.170(e)	New	
5.171(a)	3.344(a)	Protection of 5-year stabilized ratings.
5.171(b)	3.344(c)	
5.171(c)(1)	3.344(c)	
5.171(c)(2)	3.344(a)	
5.171(d) (introduction)	New	
5.171(d)	3.344(a)	
5.171(e)	3.344(b)	
5.172(a)	3.951(b) (first sentence)	Protection of continuous 20-year ratings.
5.172(b)	3.951(b) (second sentence)	
5.172(c)	New	
5.173	3.951(a)	Protection against reduction of disability

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		rating when VA revises the Schedule for Rating Disabilities.
5.174(a)	3.953(a)	Protection of entitlement to benefits established before 1959.
5.174(b)	3.953(c)	
5.175(a)(1)	3.957 (first sentence)	Severance of service connection.
5.175(a)(2)	3.957 (last sentence)	
5.175(b)(1)	3.105(d) (first and second sentences)	
5.175(b)(2)	3.105(d) (third and fourth sentences)	
5.176		Reserved
5.177(a)	3.105 introductory text (last sentence)	Effective dates for reducing or discontinuing benefit payments or for severing service connection.
5.177(b)	3.105 introductory text (second sentence)	
5.177(c)	3.105 introductory text (first sentence), 3.105(d) (fifth through last sentences), 3.500(r)	
5.177(d)	3.105(c), 3.55(r)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.177(e)	3.105(e), 3.500(r), 3.501(g)(2)	
5.177(f)	3.105(f), 3.501(e)(1), 3.501(g)(1)	
5.177(g)	3.105(g), 3.500(r)	
5.177(h)	3.105(h) (last sentence)	
5.177(i)	3.105 introductory text (first sentence), 3.500(b)	
5.178		Reserved
5.179		Reserved
Subpart D – Dependents and Survivors		
General Dependency Provisions		
5.180		Reserved
5.181(a)	3.213(a) (first sentence)	Evidence needed to establish dependents.
5.181(b)	3.204(a)(1), 3.213(a), 3.213(c)	
5.181(c)	3.204(a)(2), 3.204(b), 3.213(c)	
5.181(d)	3.204(c)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.182(a)	3.213(a), 3.277(b), 3.660(a)(1)	Changes in status of dependents.
5.182(b)	3.213(c)	
5.183(a)(1)	3.401(b)(1)(ii), 3.660(c) (second sentence)	Effective date of awards of benefits for a dependent.
5.183(a)(2)	3.401(b)(2)	
5.183(a)(3)	New	
5.183(b)(1)	3.401(b)(1)(i), 3.660(c) (first sentence)	
5.183(b)(2)	3.401(b)(1)(i), 3.660(c) (first sentence)	
5.183(b)(3)	3.401(b)(1)(i), 3.403(a)(5), 3.660(c) (first sentence)	
5.183(b)(4)	3.401(b)(3)	
5.183(b)(5)	3.401(b)(4)	
5.184(a)	3.500(g)(2)(ii), 3.501(d)(2), 3.660(a)(2) (last sentence)	Effective date of reduction or discontinuance based on changes in dependency status.
5.184(b)	New	
5.184(c)	New	
5.184(d)	3.213(b) (first sentence)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.185-5.190		Reserved
Marriage, Divorce, and Annulment		
5.191	3.1(j)	Marriages VA recognizes as valid.
5.192(a)	New	Evidence of marriage.
5.192(b)	3.205(b)	
5.192(c) (except (c)(6)(i))	3.205(a)	
5.192(c)(6)(i)	New	
5.193	3.205(b) (last sentence)	Proof of marriage termination where evidence is in conflict or termination is contested.
5.194(a)	3.206 (first sentence)	Acceptance of divorce decrees.
5.194(b)(1), 5.194(b)(2)	3.206(a) introductory text	
5.194(b)(3)	New	
5.194(c)(1)	3.206(b)	
5.194(c)(2)	3.206(c)	
5.195		Reserved
5.196(a)(1)	New	Void or annulled marriages.
5.196(a)(2)	3.207(a)	
5.196(b)	3.207(b)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.197 (introduction)	3.502(d), 3.503(a)(4)	Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.
5.197(a)	3.500(n)(1)	
5.197(b)	3.500(n)(2)(ii)	
5.198		Reserved
5.199		Reserved
Surviving Spouse Status		
5.200(a)	3.52 introductory text	Surviving spouse: requirement of valid marriage to veteran.
5.200(b)(1)	3.52(a)	
5.200(b)(2)	3.52(b), 3.205(c)	
5.200(b)(3)	3.52(c)	
5.200(b)(4)	3.52(d)	
5.201(a)	3.50(b) (except (b)(2))	Surviving spouse: requirements for relationship with the veteran.
5.201(b) (introduction)	3.53(a) (first sentence)	
5.201(b)(1)	3.54(e)	
5.201(b)(2)(i)	3.53(a) (first sentence)	
5.201(b)(2)(ii)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.201(b)(3)	3.53(b) (second sentence)	
5.201(b)(4)	3.53(a) (second sentence)	
5.201(b)(5)	3.53(b) (first sentence)	
5.201(b)(6)	3.53(b) (last sentence)	
5.202		Reserved
5.203(a)(1)	3.50(b)(2), 3.214	
5.203(a)(2)	3.50(b)(2)	
5.203(b)(1)	3.50(b)	
5.203(b)(2)	3.500(n)(3)	
5.203(b)(3)	3.400(w)	
5.203(c)	3.55(a)(1)	Effect of remarriage on a surviving spouse's benefits.
5.203(d)(1)-(3)	3.55(a)(2)	
5.203(d)(4)	3.55(a)(5), 3.55(a)(8), 3.215	
5.203(e)(1), except (e)(1)(iii)	3.55(a)(3)	
5.203(e)(1)(iii)	3.55(a)(6)	
5.203(e)(2)	3.55(a)(3)	
5.203(f)	3.55(a)(10)(i)	
5.204		Reserved

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.205	3.400(v)	Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.
5.206-5.219		Reserved
Child Status		
5.220, except 5.220(b)(1) and 5.220(d)	3.57(a)	Status as a child for VA benefit purposes.
5.220(b)(1)	3.57(a)(1)(ii), 3.315(a), 3.356(b) (first sentence)	
5.220(d)	3.503(a)(2)	
5.221	3.210(a), 3.210(b)	Evidence to establish a parent/natural child relationship.
5.222(a), 5.222(c), 5.222(d)	3.57(c) introductory text, 3.210(c) introductory text	Evidence to establish an adopted child relationship.
5.222(b)	3.210(c)(1) introductory text, 3.210(c)(1)(i)	
5.223(a)	3.210(c)(2)	Child adopted after a veteran's death.
5.223(b) (except (b)(1))	3.210(c)(2)	
5.223(b)(1)	3.57(c)(1)-(3)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.224(a)	3.58	Child status despite adoption out of the veteran's family.
5.224(b)	3.210(c)(1) introductory text, 3.210(c)(1)(ii)	
5.225(a)	3.57(e)(1)	Child status based on adoption into a veteran's family under foreign law.
5.225(b)(1)	3.57(e)(2)	
5.225(b)(2)	3.57(e)(4)	
5.225(c)	New	
5.225(d)	3.57(e)(3)	
5.226(a)	3.57(b), 3.210(d)	Child status based on being a veteran's stepchild.
5.226(b)	3.57(b), 3.210(d)	
5.226(c), 5.226(d)	New	
5.227(a)	3.356(a)	Child status based on permanent incapacity for self-support.
5.227(b)(1)(i)	3.356(b)(1)	
5.227(b)(1)(ii)	3.356(b)(2) (last sentence)	
5.227(b)(1)(iii)	3.356(b)(4)	
5.227(b)(1)(iv)	3.356(b)(3) (last sentence)	
5.227(b)(2)(i)	3.356(b)(3)	
5.227(b)(2)(ii)	3.356(b) introductory text,	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
	3.356(b) (third sentence)	
5.227(c)(1)	3.356(b)(3)	
5.227(c)(2)(i)	3.356(b) introductory text, 3.356(b) (second sentence)	
5.227(c)(2)(ii)-(iv)	New	
5.227(d), except for (d)(3)	New	
5.227(d)(3)	3.356(b)(2) (first sentence)	
5.228(a)	New	Exceptions applicable to termination of child status based on marriage of the child.
5.228(b)	3.55(b)	
5.229 (introduction)	3.204(b)	Proof of age or birth.
5.229(a)	3.209(a)	
5.229(b)	3.209(b), 3.209(g)	
5.229(c)	3.209(c)	
5.229(d)	3.209(d)	
5.229(e)	3.209(e)	
5.229(f)	3.209(f)	
5.229(g)	3.209(g)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Effective Dates of Changes in Child Status		
5.230	3.403(a)(3)	Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.
5.231	3.503(a) introductory text, 3.503(a)(1)	Effective date of reduction or discontinuance: child reaches age 18 or 23.
5.232	3.503(a)(10)	Effective date of reduction or discontinuance: terminated adoptions.
5.233	3.503(a)(6)	Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household.
5.234(a)	New	Effective date of an

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.234(b)	3.403(a)(1)	award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.
5.234(c)(1)	3.503(a)(3)(i)	
5.234(c)(2)	3.503(a)(3)(ii)	
5.235(a)	New	Effective date of an award of benefits due to termination of a child's marriage.
5.235(b)	3.400(u)	
5.236		Reserved
5.237		Reserved
Parent Status		
5.238(a)	3.59(a), 3.59(b) (first sentence)	Status as a veteran's parent.
5.238(b)	New	
5.238(c)	New	
5.238(d)(1), 5.238(d)(2)(i)	3.59(b) (second and third sentences)	
5.238(d)(2)(ii), 5.238(e)	New	
5.239		Reserved

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Subpart E – Claims for Service Connection and Disability Compensation		
Service-Connected and Other Disability Compensation		
5.240(a)	3.4(a), 3.4(b)(1)	Disability compensation.
5.240(b)	3.4(b)(2)	
5.241(introduction)	New	Service-connected disability.
5.241(a), 5.241(b)	3.1(k), 3.303(a) (first and second sentences)	
5.241(c)	New	
5.242(a)	3.303(a) (third sentence)	General principles of service connection.
5.242(b)	3.304(b)(3)	
5.243(a)	New	Establishing service connection.
5.243(b)	3.303(d)	
5.243(c)	3.303(b) (first through third sentences)	
5.243(d)	3.303(b) (fifth sentence)	
5.244(a)	3.304(b) introductory text (first sentence)	condition on entry into military service.
5.244(b)(1)	3.304(b)(1) (first	

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	sentence)	
5.244(b)(2)	New	
5.244(c)(1)	3.304(b) introductory text (first sentence)	
5.244(c)(2)	New	
5.244(d)	3.303(c) (first through fifth sentences)	
5.245	3.306(a)	Service connection based on aggravation of preservice injury or disease.
5.245(b)(1)	New	
5.245(b)(2)	New	
5.245(b)(3)	3.306(b)(1)	
5.245(b)(4)	3.306(b)(2)	
5.245(c)	3.306(b), 3.306(c)	
5.246	3.310(a)	Secondary service connection—disability that is proximately caused by service-connected disability.
5.247	3.310(b)	Secondary service connection—nonservice-connected disabilities

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		aggravated by service-connected disability.
5.248	3.310(c)	Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
5.249(a)(1)	3.304(d)	Special service connection rules for combat-related injury or disease.
5.249(a)(2)	New	
5.249(b)	New	
5.250(a)	3.304(f) introductory text	Service connection for posttraumatic stress disorder.
5.250(b)	New	
5.250(c)	3.304(f)(1)	
5.250(d)	3.304(f)(2), 3.304(f)(4)	
5.250(e)	3.304(f)(3)	
5.250(f)	3.304(f)(5)	
5.251(a)	3.303(c) (last sentence)	Current disabilities for which VA cannot grant service connection.
5.251(b), 5.251(c), 5.251(d)	New	
5.251(e)	3.380	
5.252-5.259		Reserved
Presumptions Concerning Service		

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Connection for Certain Diseases, Disabilities, and Related Matters		
5.260(a)	New	General rules governing presumptions of service connection.
5.260(b)	3.307(b), 3.307(c) (first sentence)	
5.260(c)(1)	3.307(d)(1)	
5.260(c)(2)	New	
5.261(a) (introduction)	3.307(a)(3)	Certain chronic diseases VA presumes are service connected.
5.261(a)(1)	3.307(a)(3)	
5.261(a)(2)	New	
5.261(b)	3.307(a)(1) (first and second sentences)	
5.261(c) (introduction)	3.307(a)(3), 3.307(b)	
5.261(c) (table)	3.307(a)(3), 3.307(b), 3.309(a)	
5.261(d)	3.309(a)	
5.261(e)	New	
5.262(a)(1)	3.307(a)(6)(iii), 3.307(a)(6)(iv)	Presumption of service connection for diseases

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5.262(a)(2)	3.307(a)(6)(ii)	associated with exposure to certain herbicide agents.
5.262(b)	3.307(a)(6)(i)	
5.262(c)	3.307(a)(1) (last sentence)	
5.262(d)	3.307(a)(6)(iii), 3.307(a)(6)(iv)	
5.262(e)	3.307(a)(6)(ii), 3.309(e)	
5.262(e) Note 1	3.309(e) Note 2	
5.262(e) Note 2	3.309(e) Note 1	
5.262(e) Note 3	3.309(e) Note 3	
5.263	3.313	Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.
5.264(a) (introduction)	3.307(a)(1) (last sentence), 3.307(a)(5)	Diseases VA presumes are service connected in a former prisoner of war.
5.264(a)(1)	3.309(c)(1), 3.309(c)(2)(i)	
5.264(a)(2)	3.307(a)(5), 3.309(c)(1), 3.309(c)(2)(ii)	
5.264(b)	3.309(c)(1)	
5.264(c)	3.309(c)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.265(a)	3.307(a)(4)	Tropical diseases VA presumes are service connected.
5.265(b)	3.307(a)(1) (first and second sentences)	
5.265(c)	3.307(a)(2)	
5.265(d)	3.309(b)	
5.265(e)	3.307(d)(1) (third and last sentences)	
5.265(f)	3.308(b)	
5.266	3.317	Disability compensation for certain qualifying chronic disabilities.
5.267	3.316(a)	Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.
5.268(a)	3.309(d)(3)(i)	Presumption of service connection for diseases associated with exposure to ionizing
5.268(b)	3.309(d)(1), 3.309(d)(2)	
5.268(c) (introduction)	3.309(d)(3)(ii)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.268(c)(1) (introduction)	3.309(d)(3)(ii)(A), 3.309(d)(3)(iv) introductory text	radiation.
5.268(c)(1)(i)-(iv)	3.309(d)(3)(iv)(A)-(D)	
5.268(c)(2)	3.309(d)(3)(ii)(B), 3.309(d)(3)(vi)	
5.268(c)(3) (introduction)	3.309(d)(3)(ii)(C), 3.309(d)(3)(vii) introductory text	
5.268(c)(3)(i)-(iv)	3.309(d)(3)(vii)(A)-(D)	
5.268(c)(4) (introduction)	3.309(d)(3)(ii)(D)(*1*)	
5.268(c)(4) (i)	3.309(d)(3)(ii)(D)(*1*)(*i*)	
5.268(c)(4)(ii)	3.309(d)(3)(ii)(D)(*1*)(*ii*)	
5.268(c)(4) (Note)	3.309(d)(3)(ii)(D)(*3*)	
5.268(c)(5)	3.309(d)(3)(ii)(D)(*2*)	
5.268(c)(6)	3.309(d)(3)(ii)(E)	
5.268(d)	3.309(d)(3)(iii)	
5.268(e)	3.309(d)(3)(v)	
5.268 Note	New	
5.269(a) (introduction first sentence)	3.311(a)(1), 3.311(b)(1)	Direct service connection for diseases associated with exposure to ionizing
5.269(a) (introduction second and last sentence)	3.311(b)(1)(iii)	

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5.269(a)(1)	3.311(b)(1)(i)	radiation.
5.269(a)(2)	3.311(b)(1)(ii)	
5.269(a)(3)	3.311(b)(1)(iii)	
5.269(b) (introduction)	3.311(b)(2) introductory text	
5.269(b)(1)	3.311(b)(2)(i)-(xxiv), 3.311(b)(5)	
5.269(b)(2)	3.311(b)(3)	
5.269(b)(3)	3.311(b)(4)	
5.269(c)(1) (introduction first sentence)	3.311(a)(1) (except last sentence)	
5.269(c)(1) (introduction last sentence)	3.311(a)(2) introductory text	
5.269(c)(1)(i)-(iii)	3.311(a)(2)(i)-(iii)	
5.269(c)(2)	3.311(a)(1) (last sentence)	
5.269(c)(3)	3.311(a)(4)(ii)	
5.269(c)(4)	3.311(a)(4)(i)	
5.269(d)(1)	3.311(a)(1) (except last sentence)	
5.269(d)(2)	New	
5.269(e)(1) (introduction first sentence)	3.311(c) introductory text	

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5.269(e)(2)	3.311(a)(3)	
5.269(f)(1)	3.311(c)(1) introductory text, 3.311(c)(1)(i), 3.311(e)	
5.269(f)(2)	3.311(c)(3)	
5.269(f)(3)	3.311(c)(1)(ii)	
5.269(f)(4)	3.311(c)(2), 3.311(d)(1), 3.311(d)(2)	
5.269(f)(5)	3.311(d)(3) (first sentence)	
5.269(f)(6)	3.311(d)(3) (second sentence)	
5.269(g)	3.311(f)	
5.269(h)	3.311(g)	
5.270	3.318	Presumption of service connection for amyotrophic lateral sclerosis.
5.271	3.317(c), 3.317(d), 3.317 Table, 3.317(e)(2)	Presumption of service connection for infectious diseases
5.272-5.279		Reserved
Rating Service-Connected Disabilities		

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5.280(a)	3.321(a), 3.321(b)(1), 3.321(b)(3), 3.321(c)	General rating principles.
5.280(b)(1)	3.321(b)(1)	
5.280(b)(2)	3.321(b)(3)	
5.280(c)	3.321(c)	
5.281	3.324	Multiple 0 percent service-connected disabilities.
5.282(a)	3.383(a)	Special consideration for paired organs and extremities.
5.282(b)	3.383(a)(1)-(5)	
5.282(c)(1)	3.383(b)(1)	
5.282(c)(2)	3.383(b)(1)	
5.282(c)(3)	3.383(c)	
5.282(c)(4)	3.383(d)	
5.283	3.340	Total and permanent total ratings and unemployability.
5.284	3.341	Total disability ratings for disability compensation purposes.
5.285(a)	3.343(a)	Discontinuance of total disability ratings.

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.285(b)	3.343(c)	
5.286-5.299		Reserved.
Additional Disability Compensation Based on a Dependent Parent		
5.300(a)(1)	3.250(a)(1)	Establishing dependency of a parent.
5.300(a)(2)	New	
5.300(b) (introduction)	3.250(a)(2) (first sentence)	
5.300(b)(1)	3.250(b) introductory text	
5.300(b)(1)(i)	3.250(b)(1)	
5.300(b)(1)(ii)	3.250(c)	
5.300(b)(2)(i)	3.250(a)(2) (last sentence)	
5.300(b)(2)(ii)	3.250(b)(2)	
5.300(c)	3.250(b)(2)	
5.300(d)	3.660(a)(1)	
5.300(e)	3.250(d)	
5.301		Reserved.
5.302(a)	3.262(a) introductory text	General income rules–parent's dependency.
5.302(b)	3.262(b)(1)	
5.302(c)	3.261(a)(3)	
5.302(d)	3.262(k)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.302(e)	3.262(k)(3)	
5.303(a)	3.262(a)(2)	Deductions from income–parent's dependency.
5.303(b)	3.261(a)(24), 3.262(i)(1), 3.262(j)(4)	
5.303(c)	3.262(a)(1)	
5.304(introduction)	3.261 introductory text, 3.262(t) introductory text	Exclusions from income–parent's dependency.
5.304(a)	3.261(a)(7)	
5.304(b)	3.262(h)	
5.304(c)	3.261(a)(12)	
5.304(d), except (d)(6)	3.261(a)(20)	
5.304(d)(6)	New	
5.304(e)	3.261(a)(20)	
5.304(f)	3.261(a)(13)	
5.304(g)	3.261(a)(28), 3.262(t)(2)	
5.304(h)	3.261(a)(30), 3.262(k)(4)	
5.304(i)	3.261(a)(31)	
5.304(j)	3.262(a)(2) (last sentence)	
5.304(k)	3.261(a)(22)	
5.304(l)	New	

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5.304(m)	New	
5.305-5.310		Reserved
Disability Compensation Effective Dates		
5.311	3.400(b)(2)	Effective dates–award of disability compensation.
5.312(a)	New	Effective dates–increased disability compensation.
5.312(b)	3.400(o)(2)	
5.313(a)	New	Effective dates–discontinuance of compensation for a total disability rating based on individual unemployability.
5.313(b)	3.501(e)(2)	
5.313(c)	3.501(f)	
5.314(a)	New	Effective dates–discontinuance of additional disability compensation based on parental dependency.
5.314(b)	3.660(a)(2)	
5.314(c)	3.500(n)(2)(ii), 3.660(a)(2) (last sentence)	
5.314(d)	3.500(g)(2)(ii), 3.660(a)(2) (last	

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	sentence)	
5.315	3.660(d)	Effective dates–additional disability compensation based on decrease in the net worth of a dependent parent.
5.316-5.319		Reserved
Special Monthly Compensation: General		
5.320 (introduction)	3.352(a) (fifth sentence)	
5.320(a)	3.352(a) (first and fifth through seventh sentences), 3.352(c)	Determining need for regular aid and attendance.
5.320(b)	3.352(a) (second through fourth sentences)	
5.321(a)	3.351(a)(2)	Additional disability compensation for a veteran whose spouse needs regular aid and attendance.
5.321(b)	3.351(c)(1), 3.351(c)(2)	
5.321(c)	3.351(c)(3)	

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5.322(a)	New	Special monthly compensation: general information and definitions of disabilities.
5.322(b)	3.350(a)(2)(i)	
5.322(c)	3.350(a)(2)(i), 3.350(a)(2)(i)(*b*)	
5.322(d)	3.350(c)(2)	
5.322(e) (introduction)	New	
5.322(e)(1)	3.350(d) introductory text (except first sentence)	
5.322(e)(2)	3.350(d) introductory text (except first sentence)	
5.322(f)	3.350(b)(2) (second sentence)	
5.322(g)	3.350(a)(4)	
Special Monthly Compensation: Specific Statutory Bases		
5.323(a)	3.350(a) (first sentence)	Special monthly compensation under 38 U.S.C. 1114(k).
5.323(b)(1)	3.350(a) (second sentence)	
5.323(b)(2)(i)	3.350(a) (third sentence)	
5.323(b)(2)(ii)	New	
5.323(b)(3)	3.350(a) (fourth	

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	sentence)	
5.323(c)(1)	New	
5.323(c)(2)	3.350(a)(1)(i) introductory text (first sentence)	
5.323(c)(3) (introduction)	3.350(a)(1)(i) introductory text (second sentence)	
5.323(c)(3)(i)-(iii)	3.350(a)(1)(i)(a)-(c)	
5.323(c)(3)(iv)	New	
5.323(c)(4), 5.323(c)(5)	New	
5.323(c)(6)	3.350(a)(1)(iii)	
5.323(c)(7)	3.350(a)(1)(iv)	
5.323(d)(1)	3.350(a)(3)(i)	
5.323(d)(2)	3.350(a)(3)(ii)	
5.323(e)	3.350(a)(5)	
5.323(f)	3.350(a)(6)	
5.324 (introduction)	3.350(b) introductory text	Special monthly compensation under 38 U.S.C. 1114(l)
5.324(a)	3.350(b) introductory text	
5.324(b)	3.350 introductory text	
5.324(c)	3.350(b) introductory text,	

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	3.350(b)(2) (except second sentence)	
5.324(d)	3.350(b) introductory text	
5.324(e)	3.350(b) introductory text, 3.350(b)(3), 3.350(b)(4) (second sentence)	
5.325 (introduction)	3.350(f) introductory text	Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).
5.325(a)	3.350(f)(1)(i)	
5.325(b)	3.350(f)(1)(iii)	
5.325(c)	3.350(f)(1)(vi)	
5.325(d)	3.350(f)(2)(i)	
5.326 (introduction)	3.350(c)(1) introductory text	Special monthly compensation under 38 U.S.C. 1114(m).
5.326(a)	3.350(c)(1)(i)	
5.326(b)	3.350(c)(1)(ii)	
5.326(c)	3.350(f)(1)(ii)	
5.326(d)	3.350(f)(1)(iv)	
5.326(e)	3.350(c)(1)(iii)	
5.326(f)	3.350(f)(1)(viii)	
5.326(g)	3.350(c)(1)(iv)	
5.326(h)	3.350(f)(2)(ii)	
5.326(i)	3.350(c)(1)(v), 3.350(c)(3)	

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5.327 (introduction)	3.350(f) introductory text	Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).
5.327(a)	3.350(f)(1)(x)	
5.327(b)	3.350(f)(1)(v)	
5.327(c)	3.350(f)(1)(vii)	
5.327(d)	3.350(f)(1)(ix)	
5.327(e)	3.350(f)(2)(iii)	
5.328	3.350(d) introductory text (first sentence)	Special monthly compensation under 38 U.S.C. 1114(n).
5.328(a)	3.350(d)(1)	
5.328(b)	3.350(f)(1)(xi)	
5.328(c)	3.350(d)(2)	
5.328(d)	3.350(d)(3)	
5.328(e)	3.350(d)(4)	
5.329	3.350(f) introductory text, 3.350(f)(1)(xii)	Special monthly compensation under 38 U.S.C. 1114(n) and (o).
5.330 (introduction)	3.350(e)(1) introductory text	Special monthly compensation under 38 U.S.C. 1114(o)
5.330(a)	3.350(e)(1)(i)	
5.330(b)	3.350(e)(1)(iii)	
5.330(c)	3.350(e)(1)(iv)	
5.330(d)	3.350(e)(2)	

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5.330(e)	3.350(e)(1)(ii), 3.350(e)(3)	
5.331(a)	3.350(f) introductory text	Special monthly compensation under 38 U.S.C. 1114(p)
5.331(b)(1)	3.350(f)(2)(iv)	
5.331(b)(2)	3.350(f)(2)(v)	
5.331(b)(3)	3.350(f)(2)(vi)	
5.331(c)	3.350(f)(2)(vii)	
5.331(d)(1)	3.350(f)(3)	
5.331(d)(2)	3.350(f)(4)(i)	
5.331(d)(3)	3.350(f)(3)	
5.331(e)(1)	3.350(f)(4) introductory text	
5.331(e)(2)	3.350(f)(4)(i)	
5.331(e)(3)	3.350(f)(4)(ii)	
5.331(f)	3.350(f)(5)	
5.332(a)	3.350(h)(1), 3.350(h)(2)	Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).
5.332(b)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence), 3.350(h)(3) (first sentence), 3.352(b)(1)(ii)	
5.332(c)(1)	3.350(h)(1) (first	

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	sentence), 3.350(h)(2) (first sentence), 3.350(h)(3) (second and last sentences), 3.352(b)(1)(ii)	
5.332(c)(1)(i)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence) 3.352(b)(1)(i)	
5.332(c)(1)(ii)	3.352(b)(1)(ii)	
5.332(c)(1)(iii), 5.332(c)(1)(iv)	3.352(b)(1)(iii)	
5.332(c)(1)(v)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence)	
5.332(c)(2)	3.352(b)(2) (first sentence)	
5.332(c)(3)	3.352(b)(2) (second sentence)	
5.332(c)(4)	3.352(b)(2) (third sentence)	
5.332(c)(5)	3.352(b)(3)	
5.332(c)(6)	3.352(b)(4)	

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5.332(c)(7)	New	
5.333 (introduction)	3.350(i) (introduction)	Special monthly compensation under 38 U.S.C. 1114(s).
5.333(a)	3.350(i)(1)	
5.333(b)	3.350(i)(2)	
5.334	New	Special monthly compensation tables.
Special Monthly Compensation: Effective Dates		
5.335	3.401(a)(1)	Effective dates: special monthly compensation under §§ 5.332 and 5.333.
5.336(a)	3.401(a)(3)	Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.
5.336(b)	3.501(b)(3)	
5.337-5.339		Reserved
Tuberculosis		
5.340	3.370	Pulmonary tuberculosis shown by X-ray in active

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		military service.
5.341	3.371	Presumption of service connection for disease; wartime and service after December 31, 1946.
5.342	3.372	Initial grant following inactivity of tuberculosis.
5.343	3.374	Effect of diagnosis of active tuberculosis.
5.344	3.375	Determination of inactivity (complete arrest) of tuberculosis.
5.345	3.378	Changes from activity in pulmonary tuberculosis pension cases.
5.346(a)	3.959	Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.
5.346(b)(1)(i)	3.350(g)(1)	
5.346(b)(1)(ii)	3.401(g)	
5.346(b)(2)	3.350(g)(2)	
5.347	3.343(b)	Continuance of a total disability rating for

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		service-connected tuberculosis.
5.348		Reserved
5.349		Reserved
Injury or Death Due to Hospitalization or Treatment		
5.350	3.361	Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
5.351	3.400(i)	Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination,

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		training and rehabilitation services, or compensated work therapy program.
5.352	3.362	Effect of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962, on benefits awarded under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

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5.353	3.363	Effect of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962, on benefits awarded under 38 U.S.C. 1151(a).
5.354-5.359		Reserved
Ratings for Health-care Eligibility Only		
5.360(a)(1)	New	Service connection of dental conditions for treatment purposes.
5.360(a)(2)	3.381(a)	
5.360(b) (introduction)	3.381(b) (first sentence)	
5.360(b)(1)	3.381(d) (first sentence)	
5.360(b)(2)	3.381(c)	
5.360(c)(1)	3.381(b) (first sentence)	
5.360(c)(2)	New	
5.360(c)(3)	3.381(b) (last sentence)	
5.360(d) (introduction)	3.381(d) (last sentence)	

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5.360(d)(1)	3.381(e)(1)	
5.360(d)(2)	3.381(e)(2)	
5.360(d)(3)	3.381(e)(3)	
5.360(d)(4)	3.381(e)(4)	
5.360(d)(5)	3.381(f)(3)	
5.360(d)(6)	3.381(f)(4)	
5.360(d)(7)	3.381(g)	
5.360(e) (introduction)	3.381(f) introductory text	
5.360(e)(1)	3.381(e)(5)	
5.360(e)(2)	3.381(e)(6)	
5.360(e)(3)	3.381(f)(1)	
5.361(a)	3.360(a)	Health care eligibility of a person administratively discharged under other-than-honorable conditions.
5.361(b)	3.360(c)	
5.361(c)	3.360(b)	
5.362	New	Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and

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		medical care.
5.363	3.359	Determination of service connection for a former member of the Armed Forces of Czechoslovakia or Poland.
5.364		Reserved
Miscellaneous Service-Connection Regulations		
5.365	3.300	Claims based on the effects of tobacco products.
5.366	3.385	Disability due to impaired hearing.
5.367	3.357	Civil service preference ratings.
5.368(a)	3.315(b)	Basic eligibility

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5.368(b)	3.315(c)	determinations: home loan and education benefits.
5.369		Reserved
Subpart F – Nonservice-Connected Disability Pensions and Death Pensions		
Improved Pension Requirements: Veterans, Surviving Spouse, and Surviving Child		
5.370	3.1(w), 3.23(a), 3.23(b), 3.23(d)(4)-(5), 3.24(a), 3.271(a), 3.271(h), 3.351(b), 3.351(f)	Definitions for Improved Pension.
5.371(a)	3.24(a)	Eligibility and entitlement requirements for Improved Pension.
5.371(b)	3.3(a)(3)	
5.371(c)	3.3(b)(4), 3.24(a)	
5.371(d)	3.3(a)(3)(v), 3.3(b)(4)(iii), 3.23(b)	
5.372(a)	New	Wartime service

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.372(b)	3.3(a)(3)(i)-(iv), 3.3(b)(4)(i)	requirements for Improved Pension.
5.372(c)	3.3(b)(4)(ii)	
5.373	3.208	Evidence of age in Improved Pension claims.
5.374-5.379		Reserved
Improved Disability Pension: Disability Determinations and Effective Dates		
5.380(a)	3.3(a)(3)(vi)(A),3.323(b), 3.342(a)	Disability requirements for Improved Disability Pension
5.380(b)	3.3(a)(3)(vi)(B)(1)-(2)	
5.380(c)(4)	3.342(b)(4)	
5.380(c)(5)	3.321(b)(2)	
5.381		Reserved
5.382		Reserved
5.383(a)	3.400 introductory text, 3.400(b)(1) (introductory text, 3.400(b)(1)(ii)(A)	Effective dates of awards of Improved Disability Pension.

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5.383(b)	New	
5.384-5.389		Reserved
Special Monthly Pension Eligibility for a Veteran and Surviving Spouse		
5.390	3.23(d)(2), 3.351(a)(1), 3.351(a)(5), 3.351(b), 3.351(c)	Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance.
5.391(a)	3.23(d)(3), 3.351(d)	Special monthly pension for a veteran or surviving spouse at the housebound rate.
5.391(b)	3.23(d)(3), 3.351(f)	
5.392	3.401(a)(1), 3.402(c)(1)	Effective dates of awards of special monthly pension.
5.393-5.399		Reserved
Maximum Annual Pension Rates		
5.400 (introduction)	3.23(a) introductory text, 3.24(b)	Maximum annual pension rates for a veteran, surviving spouse, or surviving
5.400(a)	3.23(a)(1)	
5.400(b)	3.23(a)(3)	

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5.400(c)	3.23(a)(2)	child.
5.400(d)	3.23(a)(4)	
5.400(e)	3.23(a)(5)	
5.400(f)	3.23(a)(7)	
5.400(g)	3.23(a)(6)	
5.400(h)	3.24(b)	
5.401(a)	3.27(a)	Automatic adjustment of maximum annual pension rates.
5.401(b)	3.23(a), 3.24(b), 3.27(e)	
5.402-5.409		Reserved
Improved Pension Income, Net Worth, and Dependency		
5.410(a)	3.271(a)	Countable annual income.
5.410(b)(1)	3.23(d)(4)	
5.410(b)(2)	3.23(d)(5)	
5.410(b)(3)	New	
5.410(c) (introduction)	3.271(a)	
5.410(c)(1)	3.271(a)(1), 3.273(d)	
5.410(c)(2)	3.271(a)(3), 3.273(c)	
5.410(c)(3)	3.271(a)(2), 3.273(d)	
5.410(d)	3.276(a)	
5.410(e)	3.271(b)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.410(f) (except (f)(3))	3.271(d)	
5.410(f)(3)	New	
5.410(g)	New	
5.411(a)	3.23(d)(4)-(6)	Counting a child's income for Improved Pension payable to a child's parent.
5.411(b)	3.23(d)(6) (second sentence), 3.275(a)	
5.411(c)	3.23(d)(4), 3.23(d)(5), 3.272(m), 3.275(a)	
5.412(a)	3.272(j), 3.275(a)	Income exclusions for calculating countable annual income.
5.412(b) (introduction)	3.272(a)	
5.412(b)(1)	3.272(b)	
5.412(b)(2)	New	
5.412(b)(3)	3.272(l)	
5.412(c)(1)	3.272(c)	
5.412(c)(2)	New	
5.412(d)	3.272(d)	
5.412(e)	3.272(e)	
5.412(f)	3.272(f)	
5.412(g)	3.272(n)	
5.412(h)	3.261(a)(38), 3.272(s)	

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5.412(i)-(k)	New	
5.412(l)(1)	3.272(q)	
5.412(l)(2)-(7)	New	
5.412(l)(8)	3.272(x)	
5.412(m)	New	
5.413(a)	3.272 (introductory text (second sentence)	Income deductions for calculating adjusted annual income.
5.413(b) (introduction)	3.272(g) introductory text, (g)(1) introductory text, (g)(2) introductory text	
5.413(b)(1)	3.272(g)(1)(iii), 3.272(g)(2)(iii), 3.272(g)(3)	
5.413(b)(2)(i)	3.272(g)(1)(i), 3.272(g)(1)(ii)	
5.413(b)(2)(ii)	3.272(g)(2)(i), 3.272(g)(2)(ii)	
5.413(b)(2)(iii)	3.272(g)(3)	
5.413(c)(1)(i)	3.272(h) introductory text, 3.272(h)(1)(ii)	
5.413(c)(1)(ii)	New	
5.413(c)(1)(iii)	3.272(h)(1)(ii)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.413(c)(2)(i)	3.272(h)(2)	
5.413(c)(2)(ii)	3.272(h)(1)(ii)	
5.413(c)(2)(iii)	3.272(h)(1)(ii), 3.272(h)(2)(ii)	
5.413(c)(2)(iv)	3.272(h)(1)(i)	
5.413(c)(3)	3.272(h)(1)(ii)	
5.413(d)	3.272(i)	
5.413(e)	3.271(g)	
5.413(f)	3.271(c)	
5.414(a)(1)	3.275(b)	Net worth determinations for Improved Pension.
5.414(a)(2)	3.275(c)	
5.414(a)(2)	3.276(b)	
5.414(b)(1)	3.275(b)	
5.414(b)(2)	3.275(b)	
5.414(b)(3)	3.275(e)	
5.414(b)(4)	3.275(h)	
5.414(b)(5)-(8)	New	
5.414(c)(1)	3.274(a)	
5.414(c)(2)	3.274(c)	
5.414(c)(3)(i)	3.24(b)	
5.414(c)(3)(ii)	3.274(e)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.414(d)(1) (first sentence)	3.274(a), 3.274(c), 3.274(e)	
5.414(d) (except first sentence)	3.275(d)	
5.414(e)	3.274(e)	
5.415	3.660(a)(2), 3.660(d)	Effective dates of changes in Improved Pension benefits based on changes in net worth.
5.416(a)	3.23(d)(1), 3.60	Persons considered as dependents for Improved Pension.
5.416(b)	3.23(d)(1), 3.23(d)(4)	
5.416(c)	3.23(d)(4), (5)	
5.417(a)	3.57(d)(1)	Child custody for purposes of determining dependency for Improved Pension.
5.417(b)	3.57(d)(2)	
5.417(c)	3.57(d)(3)	
5.417(d)	3.57(d)(3)	
5.418		Reserved
5.419		Reserved
Improved Pension: Income Reporting Periods, Payments, Effective Dates, and Time Limits		

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.420	New	Reporting periods for Improved Pension.
5.421	3.29(b), 3.273 introductory text, 3.273(a), 3.273(b)	How VA calculates an Improved Pension payment amount.
5.422(a)(1)	3.500(c)	Effective dates of changes to annual Improved Pension payment amounts due to a change in income.
5.422(a)(2)	3.660(a)(2) (second sentence)	
5.422(b)	3.500(c), 3.660(b), 3.660(c)	
5.423(a)	3.271(f)(1)	Improved Pension determinations when expected annual income is uncertain.
5.423(b)	3.271(f)(2)	
5.424(a)-(c)	3.660(b)	Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.
5.424(d)	New	
5.425	3.30 introductory text,	Frequency of payment of

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	3.30(a)-(d), 3.30(f)	Improved Pension benefits.
5.426-5.429		Reserved
Improved Death Pension Marriage Date Requirements and Effective Dates		
5.430(introduction)	3.54 introductory text	Marriage date requirements for Improved Death Pension.
5.430(a)	3.54(a)(1)	
5.430(b)	3.54(a)(3)	
5.431(a)	New	Effective dates of Improved Death Pension.
5.431(b)	3.400(c)	
5.432	New	Deemed valid marriages and contested claims for Improved Death Pension.
5.433(a)	3.657 introductory text	Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer
5.433(b)(1)	3.657(a) introductory text, 3.657(a)(1)	

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5.433(b)(2)	3.500(f), 3.657(a) introductory text, 3.657(a)(2)	recognized as the veteran's surviving spouse.
5.434	3.500(f) , 3.503(a)(9), 3.657(b)	Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.
		Calculating annual Improved Pension amounts for a surviving child.
5.435(a)	3.24(b)	
5.435(b)(1)	3.24(c)(1)	
5.435(b)(2)	3.24(c)(2)	
5.435(b)(3)	3.57(d)(2)	
5.436-5.459		Reserved
Choosing Improved Pension over Other VA Pension Programs		
5.460	3.1(u), 3.1(v), 3.1(x)	Definitions of certain VA

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		pension programs.
5.461		Reserved
5.462		Reserved
5.463	3.713(a)	Effective dates of Improved Pension elections.
5.464	3.700(a)(4)	Multiple pension benefits not payable.
5.465-5.469		Reserved
Continuing Entitlement to Old-Law Pension or Section 306 Pension		
5.470(a)	3.960(b), 3.252(a), 3.252(b)	Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension.
5.470(b)	3.960(d)	
5.470(c)	3.960(c)	
5.471	3.28	Annual income limits and rates for Old-Law Pension and Section 306 Pension.
5.472(a)	3.262(b)	Rating of income for Old-Law Pension and
5.472(b)(1)	3.252(c)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.472(b)(2) (introduction)	New	Section 306 Pension.
5.472(b)(2)(i), 5.472(b)(2)(ii)	3.262(h)	
5.472(b)(3)	3.260(g)	
5.472(b)(4)	3.252(c), 3.260 introductory text, 3.660(a)(2)	
5.472(c)(1)	3.262(a)(2), 3.262(a)(3)	
5.472(c)(2)	3.262(j)(4)	
5.472(c)(3)	3.261(a)(22), 3.262(a)(1)	
5.472(d)(1),	3.262(k)(1), 3.262(k)(2)	
5.472(d)(2)	3.262(k)(1), 3.262(k)(2)	
5.472(d)(3)	New	
5.472(d)(4)	3.262(k)(1)	
5.472(d)(5)	3.262(k)(3), 3.262(k)(4)	
5.472(d)(6)	3.262(k)(4)	
5.472(d)(7)	3.262(k)(5)	
5.472(e)	3.261(a)(20)	
5.472(f) (introduction)	3.262(t) introductory text	
5.472(f)(1)	3.261(a)(6), 3.262(c)	
5.472(f)(2)	3.262(r)	
5.472(f)(3)	3.261(a)(12)	
5.472(f)(4)	3.261(a)(13)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.472(f)(5)	3.261(a)(31)	
5.472(f)(6)	3.262(t)(2)	
5.472(f)(7)	3.261(a)(20)	
5.472(f)(8)	3.261(a)(7)	
5.472(f)(9)	3.262(a)(2)	
5.472(f)(10)	3.261(a)(26)	
5.472(f)(11)	3.261(a)(22)	
5.472(f)(12)	3.262(e) introductory text, 3.262(e)(1)-(2), 3.262(f)-(g), 3.262(i)(2), 3.262(j)(1)-(3)	
5.472(f)(13)	New	
5.472(g)(1)	3.262(d), 3.262(f)	
5.472(g)(2)	3.262(f)	
5.472(g)(3)	3.262(k)(1)	
5.472(h)	3.262(d)	
5.473(a)	3.262(b)(2)	Counting a dependent's income for Old-Law Pension and Section 306 Pension.
5.473(b)(1)	New	
5.473(b)(2)	3.262(b)(2)	
5.473(c)(1)	3.252(e)(2)	
5.473(c)(2)	3.252(e)(3)	
5.473(d)	3.261(a)(4)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.474(a)	3.960(a)	Deductible expenses for Section 306 Pension only.
5.474(b)	3.261(b)(1), 3.262(l), 3.262(l)(1)-(3)	
5.474(c)	3.261(b)(3), 3.262(n), 3.262(p)	
5.474(d)	3.261(b)(5), 3.262(k)(6)	
5.475(a)	3.260(f)	Gaining or losing a dependent for Old-Law Pension and Section 306 Pension.
5.475(b) (except (b)(2)(ii))	3.260(f)	
5.475(b)(2)(ii)	3.252(e)(4)	
5.475(c)	3.252(d)	
5.476(a)	3.263(b)	Net worth for Section 306 Pension only.
5.476(b)	3.263(a)	
5.476(c)	3.263(d)	
5.476(d)	New	
5.477(a) (introduction), 5.477(a)(1)	3.501(d)(2), 3.660(a)(2)	Effective dates of reductions or discontinuances of Old-Law Pension and Section 306 Pension.
5.477(a)(2)	3.660(a)(2)	
5.477(a)(3)	3.660(a)(2)	
5.477(b)	New	
5.478(a)	3.260(b)	Time limit to establish continuing entitlement to Old-Law Pension or
5.478(b)	3.660(b)(1)	
5.478(c)	3.960(d)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		Section 306 Pension.
5.479-5.499		Reserved
Subpart G – Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary		
General Provisions		
5.500(a)	New	Proof of death.
5.500(b)	3.211(a)	
5.500(c) introduction	New	
5.500(c) (except introduction)	3.211(d)	
5.500(d)	3.211(b)	
5.500(e)	3.211(c)	
5.501(a)	New	Proving death by other means.
5.501(b)	3.211(e) (first sentence)	
5.501(c)	3.211(e) (second sentence)	
5.501(d)	3.211(f), 3.211(g)	

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5.502(a)	3.212(a)	Proving death after 7 years of continuous, unexplained absence.
5.502(b)	3.212(b)	
5.502(c)	3.212(b), 3.212(c)	
5.503(a)	New	Establishing the date of death.
5.503(b)	3.212(a)	
5.503(c)	New	
5.504	3.312	Service-connected cause of death.
5.505-5.509		Reserved
Dependency and Indemnity Compensation – General		
5.510(a)	3.5(a)	Dependency and indemnity compensation – basic entitlement.
5.510(b), except for (b)(1)(ii)	New	
5.510(b)(1)(ii)	3.5(b)	
5.510(c)	3.5(d)	
5.510(d)	3.251(a)(1)	
5.511(a)	3.351(a)(3), 3.351(a)(4), 3.351(b), 3.351(c)(3)	Special monthly dependency and indemnity compensation.
5.511(b)	3.351(c)(1), 3.351(c)(2)	
5.511(c)	3.351(e)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.512	3.5(c)	Eligibility for death compensation or death pension instead of dependency and indemnity compensation.
5.513-5.519		Reserved
Dependency and Indemnity Compensation – Eligibility Requirements and Payment Rules for Surviving Spouses and Children		
5.520(a)	New	Dependency and indemnity compensation – time of marriage requirements for surviving spouses.
5.520(b)	3.22(d)	
5.520(b)(1)(i)	3.54 introductory text	
5.520(b)(1)(ii)	3.54(c)(2)	
5.520(b)(1)(iii)	3.54(c)(3)	
5.520(b)(1)(iv)	3.54(c)(1)	
5.520(b)(2)	New	
5.521	3.22(a), 3.22(b), 3.22(c)	Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of

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		death.
5.522(a), 5.522(b)	3.22(e)	Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death – offset of wrongful death damages.
5.522(c)(1)	New	
5.522(c)(2)	3.22(g)	
5.522(c)(3)	New	
5.522(c)(4)	3.22(f)	
5.522(c)(5)	3.22(g)	
5.522(d)	3.22(g)	
5.523	3.10	Dependency and indemnity compensation rate for a surviving spouse.
5.524(a), except for (a)(1)	3.650(c)(2)	Awards of dependency and indemnity compensation benefits to a child when there is a retroactive award to a schoolchild.
5.524(a)(1)	3.650(c)(1)	
5.524(b), 5.524(c)	3.650(c)(1)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.525	3.107	Awards of dependency and indemnity compensation when not all dependents apply.
5.526-5.529		Reserved
Dependency and Indemnity Compensation – Eligibility Requirements and Payment Rules for A Parent		
5.530	New	Eligibility for, and payment of, parent's dependency and indemnity compensation.
5.531(a)	3.251(b), 3.262(a) introductory text	General income rules for parent's dependency and indemnity compensation.
5.531(b)(1)	3.262(a) introductory text	
5.531(b)(2)(i)	3.261(a)(7)	
5.531(b)(2)(ii)	3.261(a)(26)	
5.531(b)(2)(iii)	3.262(h)	
5.531(c)	3.262(b)(1)	
5.531(d)(1), 5.531(d)(2)	3.262(k)(1), 3.262(k)(2)	
5.531(d)(3)	New	
5.531(d)(4)	3.262(k)(1)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.531(e)	3.260(b)	
5.532(a)	3.262(a)(2), 3.262(a)(3)	Deductions from income for parent's dependency and indemnity compensation.
5.532(b)	3.262(j)(4)	
5.532(c)	3.261(b)(2), 3.261(b)(4), 3.262(o), 3.262(p)	
5.532(d)	3.261(b)(1), 3.262(l) introductory text, 3.262(l)(4)	
5.532(e)	3.261(a)(22), 3.262(a)(1)	
5.533(a)	3.261(a)(12)	Income not counted for parent's dependency and indemnity compensation.
5.533(b)(1)	3.262(c)	
5.533(b)(2)	3.262(d), 3.262(f)	
5.533(c), 5.533(d)	3.261(a)(20)	
5.533(e)	3.262(f)	
5.533(f)	3.261(a)(13)	
5.533(g) (introduction)	3.262(e) introductory text, 3.262(e)(1), 3.262(e)(2), 3.262(e)(4)	
5.533(g)	3.262(e) introductory text, 3.262(e)(4), 3.262(f)-(g), 3.262(i)(2), 3.262(j)(1)-(2), 3.262(j)(4)	

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5.533(h)	3.262(t) introductory text, 3.262(t)(1)	
5.533(i)	3.262(k)(5)	
5.533(j)	3.261(a)(31)	
5.533(k)	3.261(a)(38), 3.262(w)	
5.533(l)-(n)	New	
5.533(o)	3.262(a)(2) (last sentence)	
5.533(p)	3.261(a)(22)	
5.533(q)	New	
5.534(a)	3.251(b), 3.260 introductory text	When VA counts a parent's income for parent's dependency and indemnity compensation..
5.534(b)	3.260(c), 3.260(d), 3.260(f)	
5.534(c)	3.260(f)	
5.535	3.660(b) introductory text, 3.660(b)(1)	Adjustment to a parent's dependency and indemnity compensation when income changes.
5.536(a)	3.25	Parent's dependency and indemnity compensation rates.
5.536(b)	3.25, 3.27(b), 3.27(e)	
5.536(c)	3.25(b), 3.251(a)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.536(d)	3.251(a)(4)	
5.536(e)	3.251(a)(5)	
5.536(f)(1)	3.25(a), 3.25(c), 3.25(d)	
5.536(f)(2)	3.25(e)	
5.536(g)	3.260(f)	
5.536(h)	3.704(b)	
5.537(b)	3.30 introductory text, 3.30(e)	Payment intervals for parent's dependency and indemnity compensation.
Effective Dates		
5.538(a)	3.400(c)(1)	Effective date of dependency and indemnity compensation award.
5.538(b)	3.400(c)(2)	
5.538(c)	3.400(c)(4)(i)	
5.538(d)	3.400(c)(4)(ii)	
5.538(e)	3.402(a)	
5.539(a)	3.657 introductory text	Discontinuance of dependency and indemnity compensation to a person no longer recognized as the
5.539(b)(1)	3.657(a) introductory text, 3.657(a)(1)	
5.539(b)(2)	3.500(f), 3.657(a) introductory text,	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
	3.657(a)(2)	veteran's surviving spouse.
5.540(a)	3.657 introductory text	Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved.
5.540(b)	3.657(b)(1)	
5.540(c)(1), 5.540(c)(2)	3.657(b)(2)	
5.540(c)(3)	New	
5.541	3.502 introductory text, 3.502(b)	Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade.
5.542(a)	3.660(b) introductory text, 3.660(b)(1)	Effective date of an award or an increased rate based on decreased income: parents'
5.542(b)	3.660(b)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		dependency and indemnity compensation.
5.543(a)	3.660(a)(2) (second sentence)	Effective date of reduction or discontinuance based on increased income: parents' dependency and indemnity compensation.
5.543(b)	3.660(a)(3)	
5.544(a)	3.650(a) introductory text	Dependency and indemnity compensation rate adjustments when an additional survivor files a claim.
5.544(b)(1)	3.650(a)(1)	
5.544(b)(2)	3.650(a)(2)	
5.544(c)	3.650(b)	
5.544(d)	3.650(a) (last paragraph)	
5.545(a)	3.402(c), 3.404	Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.
5.545(b)(1)	3.502(e)(1), 3.504	
5.545(b)(2)	New	
5.545(c)	3.402(c)(2), 3.404	
5.546-5.550		Reserved
Accrued Benefits		

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.551(a)	3.667(e), 3.1000(d)(2), 3.1000(d)(3)	Persons entitled to accrued benefits.
5.551(b)	3.1000(a)	
5.551(c)	3.1000(a)(1), 3.1000(d)(1)	
5.551(d)	3.1000(a)(2), 3.1000(f)	
5.551(e)	3.1000(a)(3), 3.1000(a)(4), 3.1000(d)(2)	
5.551(f)	3.1000(a)(5), 3.1002	
5.551(g)	3.1000(c)(2)	
5.552	3.1000(c)	Claims for accrued benefits.
5.553	3.1000(c)(1)	Notice of incomplete applications for accrued benefits.
5.554	3.803(d), 3.1000(e)-(h)	VA benefits payable as accrued benefits.
5.555	New	Relationship between accrued-benefits claim and claims filed by the deceased beneficiary.

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.556-5.563		Reserved
Special Provisions		
5.564(a)(1)	3.1003 introductory text, 3.1003(a), 3.1003(b)	Cancelation of checks mailed to a deceased payee; payment of such funds as accrued benefits.
5.564(a)(2), 5.564(a)(3)	New	
5.564(b)	3.1003(a)(2)	
5.564(c)	3.1003(c)	
5.565(a)-(d)(1)	New	Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.
5.565(d)(2)	3.1008	
5.566(a)	3.1009 introductory text	Special rules for payment of all VA benefits except insurance payments deposited in a personal funds of patients account when an incompetent veteran dies.
5.566(b) and (c)	New	
5.566(d)	3.1000(d)(1)-(3), 3.1009(a)	
5.566(e)	3.1009(b)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.567	3.1001	Special rules for payment of Old-Law Pension when a hospitalized competent veteran dies.
5.568	3.1007	Non-payment of certain benefits upon death of an incompetent veteran.
5.569-5.579		Reserved
Subpart H – Special and Ancillary Benefits for Veterans, Dependents, and Survivors		
Special Benefits for Veterans, Dependents, and Survivors		
5.580(a)	3.802(a)	Medal of Honor pension.
5.580(b)(1), 5.580(b)(2)	3.802(b)	
5.580(b)(3)	3.802(c)	
5.580(b)(4)	3.27(d)	
5.580(c), 5.580(d)	3.802(b)	
5.581(a), 5.581(b)	3.801(a)	Awards of VA benefits

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.581(c)(1)	3.801(c)(2)	based on special acts or private laws.
5.581(c)(2)	3.801(d)	
5.581(d)	3.801(b)	
5.581(e)(1)	3.801(e)	
5.581(e)(2)	New	
5.581(f)	3.801(c)(1)	
5.582	3.803	Naval pension.
5.583	3.804	Special allowance under 38 U.S.C. 1312.
5.584	3.805	Loan guaranty for a surviving spouse: eligibility requirements.
5.585	3.806	Certification for death gratuity.
5.586(a)	New	Certification for dependents' educational assistance.
5.586(b)	3.807(c)	
5.586(c)	3.807(c)	
5.587	3.811	Minimum income annuity and gratuitous annuity.
5.588	3.812	Special allowance payable under section 156 of Public Law 97-

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		377.
5.589	3.27(c); 3.814	Monetary allowance for a Vietnam veteran's child born with spina bifida.
5.590	3.27(c), 3.815	Monetary allowance for a female Vietnam veteran's child with certain birth defects.
5.591 (introduction)	New	Effective dates of awards for a disabled child of a Vietnam veteran.
5.591(a) (introduction)	3.403(b), 3.403(c), 3.814(e) introductory text, 3.815(i) introductory text	
5.591(a)(1)	3.403(b)	
5.591(a)(2)	3.403(c), 3.815(i) introductory text	
5.591(a)(3)	3.403(b), 3.403(c), 3.815(i)	
5.591(a)(4)	3.400(g), 3.814(e)(2), 3.815(i)(2)	
5.591(a)(5)	3.400(o)(2), 3.814(e)(1), 3.815(i)(1)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.591(b) (introduction)	3.500(a), 3.814(f), 3.815(j)	
5.591(b)(1)	3.814(f)(1), 3.815(j)(1)	
5.591(b)(2)	3.814(f)(2), 3.815(j)(2)	
5.591(b)(3)	3.503(b)	
5.591(b)(4)	3.814(f) introductory text; 3.815(j) introductory text	
5.591(b)(5)	3.105(g), 3.500(r)	
5.592	3.816	Awards under Nehmer Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.
5.593-5.599		Reserved
Ancillary Benefits for Certain Service-Connected Veterans and Certain Members of the Armed Forces Serving on Active Duty		
5.600-5.602		Reserved
5.603(a)	New	Financial assistance to purchase a vehicle or
5.603(b)(1)	3.808(e)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.603(b)(2)	New	adaptive equipment.
5.603(c)(1)	3.808(a), 3.808(b)	
5.603(c)(2)(i)-(iv)	3.808(b)	
5.603(c)(2)(v)	New	
5.603(d)(1)	3.808(c)	
5.603(d)(2)	New	
5.603(d)(3)	3.808(d)	
5.603(e)	3.808(c)	
5.604	3.809	Specially adapted housing under 38 U.S.C 2101(a).
5.605	3.809a	Special home adaptation grants under 38 U.S.C. 2101(b).
5.606(a)	New	Clothing allowance.
5.606(b)	3.810(a) introductory text	
5.606(b)(1)	3.810(a)(1)	
5.606(b)(2)	3.810(a)(2)	
5.606(b)(3)	3.810(a)(2)	
5.606(c)	3.810(a) introductory text	
5.606(c)(1), 5.606(c)(2)	3.810(a)(1), 3.810(a)(2)	
5.606(d)	3.810(b)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.606(e)(1)	3.810(c)(1)	
5.606(e)(2)	3.810(c)(2)	
5.606(f)	3.810(d)	
5.607-5.609		Reserved
Subpart I – Benefits for Certain Filipino Veterans and Survivors		
Philippine Service		
5.610	3.40	Eligibility for VA benefits based on Philippine service.
5.611	3.41	Philippine service: determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.
Benefits and Effective Dates of Certain Filipino Veterans and Survivors		

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.612	New	Overview of benefits available to a Filipino veteran and his or her survivor.
5.613	3.42	Payment at the full-dollar rate for disability compensation or dependency and indemnity compensation for certain Filipino veterans or their survivors residing in the U.S.
5.614	3.405	Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor.
5.615(a)	3.251(a)(3)	Parents' dependency and indemnity compensation based on certain Philippine service.
5.615(b)	3.251(a)(1), 3.251(a)(3)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.616	3.1605(a)(3) (last sentence)	Hospitalization in the Philippines.
5.617(a)	3.43(a)	Burial benefits at the full-dollar rate for certain Filipino veterans residing in the U.S. on the date of death.
5.617(b)	3.43(b)	
5.617(c)	3.43(c)	
5.618(a)	New	Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor.
5.618(b)	3.500(p)	
5.618 (c)	3.505	
5.619-5.629		Reserved
Subpart J – Burial Benefits		
Burial Benefits: General		
5.630	New	Types of VA burial benefits.
5.631(a), 5.631(b)	3.1600 (first sentence),	Deceased veterans for

Part 5 Provision	Part 3 Provision	Part 5 Section Title
	3.1600(d)	whom VA may provide burial benefits.
5.631(c)	New	
5.632	3.1601(a)(1), 3.1601(a)(2)	Persons who may receive burial benefits.
5.633(a)	3.1601(a)	Claims for burial benefits.
5.633(b)	3.203(c), 3.1601(b)	
5.634(a)	New	Reimbursable burial expenses: general.
5.634(b)(1)	3.1607	
5.634(b)(2), 5.634(b)(3)	3.1608	
5.635	3.1606	Reimbursable transportation expenses for a veteran who is buried in a national cemetery or who died while hospitalized by VA.
5.636	3.1600(b)(3), 3.1601(b)(5), 3.1603, 3.1610(b)	Burial of a veteran whose remains are unclaimed.
5.637		Reserved
Burial Benefits: Allowances & Expenses Paid by VA		

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.638(a)	3.1600(a)	Burial allowance based on service-connected death.
5.638(b)	New	
5.638(c)(1)	3.1600(g)	
5.638(c)(2)	New	
5.639(a), 5.639(c)	3.1600(g)	Transportation expenses for burial in a national cemetery.
5.639(b)	New	
5.640-5.642		Reserved
5.643	3.1600(b)(1)-(2), 3.1600(b)(4)	Burial allowance based on nonservice-connected death.
5.644(a)	3.1600(c), 3.1605 introductory text	Burial allowance for a veteran who died while hospitalized by VA.
5.644(b)(1)-(4)	3.1600(c)	
5.644(b)(5)	3.1605(a)	
5.644(b)(6)	3.1605(d)	
5.644(c)	3.1605(a)	
5.644(d)	3.1605(b)	
5.645(a)	3.1604(d)(1)(i)-(iv), 3.1604(d)(3)	Plot or interment allowance.
5.645(b)	3.1600(f)	
5.645(c)	3.1601(a)(3)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.646-5.648		Reserved
Burial Benefits: Other		
5.649(a)	3.1602(b), 3.1604(d)(4)	Priority of payments when there is more than one claimant.
5.649(b)	3.1602(a)	
5.649(c)	3.1602(c)	
5.649(d)	3.1601(a)(2)(iii) (second and third sentences)	
5.649(e)	3.1602(a)	
5.650	3.1602(d)	Escheat (payment of burial benefits to an estate with no heirs).
5.651(a), (b)	3.1604(a), 3.1604(c), 3.1604(a)(2)	Effect of contributions by government, public, or private organizations.
5.651(c)(1)	3.1604(b)(1), 3.1604(b)(2)	
5.651(c)(2)	3.1604(b)(3)	
5.651(c)(3)	New	
5.651(d)	3.1604(a)(1)	
5.652	3.1609	Effect of forfeiture on payment of burial benefits.
5.653	3.954	Eligibility based on

Part 5 Provision	Part 3 Provision	Part 5 Section Title
		status before 1958.
5.654-5.659		Reserved
Subpart K – Matters Affecting the Receipt of Benefits		
Bars to Benefits		
5.660(a)	3.301(a)	In the line of duty.
5.660(b)	3.1(m) (first sentence)	
5.660(c)	3.1(m)(1)-(3)	
5.660(d)	3.1(m) (second sentence)	
5.661(b)(1)	3.1(n)(3), 3.301(a)	Willful misconduct.
5.661(b)(2)	3.301(b)	
5.661(c)(1)	3.301(c)(2), 3.301(d)	
5.661(c)(2)	3.301(c)(3), 3.301(d)	
5.661(d)	3.302	
5.661(e)	3.301(c)(1)	
5.661(f)	3.1(n) introductory text	
5.662(a)	3.301(d)	
5.662(b)-(d)	New	Alcohol and drug abuse.
5.663	3.11	Homicide as a bar to VA benefits.
5.663(c)-(f)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.664-5.674		
Forfeiture and Renouncement of the Right to VA Benefits		
5.675(a)	3.900(a)	General forfeiture provisions.
5.675(b)	3.900(c)	
5.676(a)	3.901(a)	Forfeiture for fraud.
5.676(b)(1)	3.900(b)(2), 3.901(d)	
5.676(b)(2)	3.900(b)(2), 3.901(b)	
5.676(b)(3)(i)	3.900(b)(2), 3.901(d) (last sentence)	
5.676(b)(3)(ii)-(iii), 5.676(b)(4)	New	
5.676(b)(5)	3.669(a), 3.669(b)(1), 3.900(b)(2)	
5.676(c)(1)	3.669(d)(1), 3.900(b)(2) (last sentence)	
5.676(c)(2)(i)	3.900(b)(2), 3.901(c)	
5.676(c)(2)(ii), 5.676(c)(3)	New	
5.676(d)	3.904(a)	
5.676(e)	New	
5.677(a)	3.902(a)	Forfeiture for treasonable acts.
5.677(b)(1)	3.900(b)(2), 3.902(d)	

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5.677(b)(2)	3.900(b)(2), 3.902(b), 3.904(b) (last sentence)	
5.677(b)(3)(i)	3.900(b)(2), 3.902(d) (last sentence)	
5.677(b)(3)(ii)	3.900(b)(2), 3.904(b) (last sentence)	
5.677(b)(4)	New	
5.677(b)(5)	3.669(a), 3.669(b)(2), 3.900(b)(2)	
5.677(c)(1)	3.669(d)(1), 3.900(b)(2) (last sentence)	
5.677(c)(2)	3.900(b)(2), 3.902(c), 3.904(b)	
5.677(d)	3.902(e)	
5.677(e)	New	
5.678(a)(1)	3.903(a)(3)	Forfeiture for subversive activity.
5.678(a)(2)	3.903(a)(1)	
5.678(a)(3)	3.903(a)(2)	
5.678(a)(4)	3.903(a)(4)	
5.678(a)(5)	3.903(a)(5)	
5.678(b)(1)	3.903(b)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.678(b)(2)(i)	3.669(a)	
5.678(b)(2)(ii)	3.669(c) (first sentence)	
5.678(b)(3)(i), 5.678(b)(3)(ii)	3.900(b)(2), 3.903(b)(1)	
5.678(b)(3)(iii)	New	
5.678(b)(3)(iv)	3.900(b)(2), 3.903(b)(1), 3.904(c) (first sentence)	
5.678(c)(1)	New	
5.678(c)(2)	3.904(c) (last sentence)	
5.679(a)	3.905(a)	Forfeiture decision procedures.
5.679(b)	3.905(b)	
5.679(c)(1)	3.905(c)	
5.679(c)(2)	3.905(b)	
5.679(d), 5.679(e)	3.905(d)	
5.680(a)	3.905(a)	Revocation of forfeiture.
5.680(b)	New	
5.680(c)(1), 5.680(c)(2)	3.901(e)	
5.680(c)(3)	3.905(e)	
5.681(a)(1)	3.669(a)	
5.681(a)(2)	3.669(b)	Effective dates: forfeiture.
5.681(b)(1)	3.500(k), 3.669(b)(1) (last sentence)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.681(b)(2)	3.500(s)(1), 3.669(b)(2) (last sentence)	
5.681(b)(3)	3.500(s)(2), 3.669(c) (last sentence)	
5.682(a)	3.903(c)	Presidential pardon for offenses causing forfeiture.
5.682(b), 5.682(c)	3.669(d)(1)	
5.682(d)	3.669(d)(2)	
5.683(a), 5.683(b)	3.106(a)	Renouncement of benefits.
5.683(c)	3.106(a), 3.500(q)	
5.683(d)(1)	3.106(d)	
5.683(d)(2)	3.106(e)	
5.683(e)(1)	3.106(b), 3.400(s)	
5.683(e)(2)	3.106(c)	
5.684-5.689		Reserved
Subpart L – Payments and Adjustments to Payments		
General Rate-Setting and Payments		

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.690	3.21	Where to find benefit rates and income limits.
5.691(a)	3.260(g)	Adjustments for fractions of dollars.
5.691(b)	3.29(a), 3.29(c)	
5.691(c)	3.29(b)	
5.692	3.112	Fractions of one cent not paid.
5.693(a)	3.31(a)	Beginning date for certain VA benefit payments.
5.693(b), 5.693(c)(8), 5.693(d)	3.31 introductory text	
5.693(c)	3.31(b), 3.31(c)	
5.693(c)(1)	3.31(b)	
5.693(c)(2)	New	
5.693(c)(3)	3.31(c)(1)	
5.693(c)(4)	3.31(c)(3)	
5.693(c)(5)	3.31(c)(4)	
5.693(c)(6)	3.31(c)(5)	
5.693(c)(7)	3.31(c)(3)	
5.693(c)(8)	3.31(c)(2)	
5.693(c)(9)	3.656(a), 3.656(d)	
5.693(c)(10)	New	
5.693(d)	3.31(c)(2)	

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5.693(e)	New	
5.694		
	3.500(g)(1)	Deceased beneficiary.
5.695	3.20	Surviving spouse's benefit for the month of the veteran's death.
5.696(a)	3.57(a)(1)(iii), 3.403(a)(4)	Payments to or for a child pursuing a course of instruction at an approved educational institution.
5.696(b)	3.403(a)(4), 3.667(a)(1) and (2)	
5.696(c)	3.403(a)(4), 3.667(a)(3)-(5)	
5.696(d)	3.403(a)(4), 3.667(a)(5)	
5.696(e)	3.403(a)(4)	
5.696(f)	3.403(a)(4), 3.667(b)	
5.696(g)	3.403(a)(4), 3.503(a)(5), 3.667(c)	
5.696(h)	3.403(a)(4), 3.667(d)	
5.696(i)	3.403(a)(4), 3.667(f)	
5.697(a) (introduction)	3.32 introductory text	Exchange rates for income received or
5.697(a)(1)	3.32(a)(1)	
5.697(a)(2)	3.32(a)(2)	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.697(b)	3.32(b)	expenses paid in foreign currencies.
5.698- 5.704		Reserved
General Reductions, Discontinuances, and Resumptions		
5.705(a)	3.500 introductory text, 3.500(a), 3.501 introductory text, 3.502 introductory text, 3.500(a) introductory text	General effective dates for reduction or discontinuance of benefits.
5.705(b)	New	
5.706(a)	New	Payments excluded in calculating income or net worth.
5.706(b) (introduction)	New	
5.706(b)(1)	3.261(a)(32)	
5.706(b)(2)	3.261(a)(41), 3.262(z), 3.263(h), 3.272(v), 3.275(j)	
5.706(b)(3)	3.261(a)(36), 3.262(u), 3.263(f), 3.272(p),	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
	3.275(g)	
5.706(b)(4)	New	
5.706(b)(5)	3.261(a)(35), 3.262(s), 3.263(e), 3.272(o), 3.275(f)	
5.706(b)(6)	3.261(a)(40), 3.262(y), 3.263(g), 3.272(u), 3.275(i)	
5.706(b)(7)	New	
5.706(b)(8)	New	
5.706(b)(9)	New	
5.706(b)(10)	New	
5.706(b)(11)	3.261(a)(39),3.262(x) 3.272(t)	
5.706(b)(12)	New	
5.70(b)(13)	New	
5.706(b)(14)	New	
5.706(b)(15)	3.261(a)(33), 3.261(a)(34)	
5.706(b)(16)	New	
5.706(b)(17)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.706(b)(18)	New	
5.706(b)(19)	New	
5.706(b)(20)	New	
5.706(b)(21)	3.261(a)(33), 3.262(q)	
5.706(b)(22)	New	
5.706(b)(23)	3.261(a)(14); 3.262(e)	
5.706(b)(24)	3.261(a)(42), 3.262(aa), 3.263(i), 3.272(w), 3.275(k)	
5.707(a), 5.707(b)	New	Deductible medical expenses.
5.707(c)	3.261(b)(1), 3.262(l), 3.272(g)	
5.708(a)(1)	3.256(b)(1), 3.277(c)	Eligibility verification reports.
5.708(a)(2)	3.661(b)(2)	
5.708(b) (introduction)	3.256(b)(4), 3.277(c)(3)	
5.708(b) (except introduction)	3.256(b)(3), 3.256(b)(4), 3.277(c)(2)	
5.708(c)	New	
5.708(d)	3.661(a)(1)	
5.708(e)(1)	3.256(c), 3.277(d)	
5.708(e)(2)	New	

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.708(e)(3)	3.661(b)(2)(i)	
5.708(f)	3.661(b)(2)(iii)	
5.708(g)	3.661(b)(2)(ii)	
5.709(a)	3.256(a), 3.277(a), 3.277(b), 3.660(a)(1)	Claimant and beneficiary responsibility to report changes.
5.709(b)	3.256(a), 3.277(b)	
5.710(a)	3.651(a)	Adjustment in benefits due to reduction or discontinuance of a benefit to another payee.
5.710(b)	3.651(b)	
5.710(c)	3.651(c)	
5.711(a)	3.656(a)	Payment to dependents due to the disappearance of a veteran for 90 days or more.
5.711(b)	3.656(a)	
5.711(c)	3.656(d)	
5.711(d)(1)	3.501(c), 3.656(b)	
5.711(d)(2)	3.656(c)	
5.712	3.158(c), 3.500(t)	Suspension of VA benefits due to the disappearance of a payee.
5.713(a)-(b)(1)	3.653(a)	Restriction on VA benefit payments to an alien
5.713(b)(2), 5.713(b)(3)	New	

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		located in enemy territory.
5.713(c)	New	
5.714(a)	New	Restriction on delivery of VA benefit payments to payees located in countries on Treasury Department list.
5.714(b)	3.653(c)(1)	
5.714(c), 5.714(d)	3.653(c)	
5.714(e)	3.653(c)(1)	
5.714(f)	New	
5.715(a)	New	Claims for undelivered or discontinued benefits.
5.715(b)(1)	3.653(b)	
5.715(b)(2)	3.653(b), 3.653(c)(3)	
5.715(b)(3)	3.653(b)	
5.715(c)	3.653(b)	
5.715(d)	3.653(b), 3.653(c)(3)	
5.715(e)	3.653(d)	
5.715(f)	New	
5.716-5.719		Reserved
Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions		
5.720(a)	3.551(a), 3.552(b)(3), 3.556(a), 3.556(f)	Adjustments to special monthly compensation

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5.720(b)	3.501(b)(1)-(2), 3.552(a)(1), 3.552(b)(1), 3.552(b)(2), 3.552(c)	based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
5.720(c)(1)	3.501(b)(2), 3.552(b)(2)	
5.720(c)(2)	3.552(d), 3.552(i)	
5.720(c)(3)	3.552(f), 3.552(g)	
5.720(c)(4)	3.552(h)	
5.720(c)(5)	3.552(a)(3) (first sentence)	
5.706(c)(6)	3.552(a)(3) (second sentence)	
5.720(d)	3.552(a)(1), 3.552(a)(2)	
5.720(e)	3.552(b)(3)	
5.720(f)	3.552(k)	
5.721	New	Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.
5.722(a)(1)	3.551(e)(1)	Reduction of Improved Pension while a veteran
5.722(a)(2)	3.551(e)(1)	

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5.722(a)(3)	3.501(i)(5)(i), 3.551(e)(1)	is receiving domiciliary or nursing home care.
5.722(b)(1)	3.551(a)	
5.722(b)(2), 5.722(b)(3)	New	
5.722(b)(4)	3.551(e)(6)	
5.722(c)	3.551(e)(3)	
5.722(d)(1)	3.501(i)(5)(ii), 3.551(e)(2)	
5.722(d)(2)	New	
5.722(e)	3.551(e)(4)	
5.722(f)	3.551(h)	
5.722(g)	3.551(e)	
5.723 (except 5.723(d)	3.501(i)(6), 3.502(f), 3.551(i)	Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.
5.723(d)	New	
5.724(a)	3.501(b)(1), 3.552(b)(1), 3.552(e) (third and fourth sentences)	Reduction or discontinuance of Improved Pension based

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5.724(b)	3.552(a)(1), 3.552(a)(2)	on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
5.724(c)	3.501(i)(3), 3.552(b)(3)	
5.724(d)	3.401(a)(2), 3.552(k)	
5.725	New	Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
5.726(a)(1)	3.551(a), 3.551(c)(1)	Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
5.726(a)(2)	3.551(g)	
5.726(a)(3)	3.551(c)(1)	
5.726(a)(4)	3.501(i)(2)(i), 3.551(c)(1)	
5.726(a)(5)	3.551(f)	
5.726(b)(1)	3.551(a)	

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5.726(b)(2), 5.726(b)(3)	New	
5.726(c)	3.551(c)(3)	
5.726(d)(1)	3.501(i)(2)(iii), 3.551(c)(2)	
5.726(d)(2)	New	
5.727(a)(1)	3.551(b)(1)	Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
5.727(a)(2)	3.551(g)	
5.727(a)(3)	3.551(b)(1)	
5.727(a)(4)(i) (first sentence)	3.501(i)(1), 3.551(b)(1)	
5.727(a)(4)(i) (second sentence)	New	
5.727(a)(4)(ii)	3.551(b)(3)	
5.727(b)(1)	3.551(a)	
5.727(b)(2), 5.727(b)(3)	New	
5.727(c)(1)	3.551(b)(2)	
5.727(c)(2)	3.551(b)(3)	
5.728(a)	3.501(b)(1), 3.552(b)(1), 3.552(e), 3.552(j)	Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or
5.728(b)	3.552(e)	
5.728(c)	3.552(b)(3)	

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		nursing home care.
5.729(a)	3.556(a)	Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
5.729(b)	3.556(b), 3.556(d) (third and fourth sentences)	
5.729(c)	3.556(c)	
5.729(d)	3.556(d) (first sentence), 3.556(e)	
5.730(a)	3.556(a)(1)	Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released
5.730(b)	3.556(b)	
5.730(c)	3.556(e)	
5.730(d)	3.556(d)	

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		from such care.
5.731-5.739		Reserved
Payments to a Beneficiary Who is Eligible for More than One Benefit: General Provisions		
5.740(a), 5.740(b)	3.701(b)	Definitions relating to elections.
5.740(d)	3.750(d)(2)	
5.741(a)	New	Persons who may make an election.
5.741(b)	New	
5.742(a)	3.701(b), 3.702(d)(1) (second sentence), 3.711 (second sentence)	Finality of elections; cancellation of certain elections.
5.742(b)	New	
5.742(c)	3.702(d)(1) (second sentence)	
5.742(d), 5.742(e)	New	
5.743(a)	3.400(j)(1)	General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.
5.743(b)	3.500(e) (first sentence), 3.500(i), 3.500(x)	

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5.744		Reserved
Payments from Service Departments and the Effects of Those Payments on VA Benefits		
5.745	3.401(e), 3.750	Entitlement to concurrent receipt of military retired pay and VA disability compensation.
5.745(b)(4)	3.261(a)(15)	
5.746(a)	3.654(a) (first sentence), 3.700(a)(1)(i)	Prohibition against receipt of active military service pay and VA benefits for the same period.
5.746(b)	3.654(a) (second sentence), 3.700(a)(1)(ii)	
5.746(c)	3.501(a), 3.654(b)(1)	
5.746(d)(1)	3.654(b)(2) (first sentence)	
5.746(d)(2)(i)	New	
5.746(d)(2)(ii)	3.654(b)(2) (third and fourth sentences)	
5.746(d)(3)	New	
5.746(d)(4)	3.654(b)(2) (second sentence)	

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5.746(d)(5)	3.654(b)(2) (last sentence)	
5.746(e)	3.654(c), 3.700(a)(1)(iii)	
5.747(a)(1)	3.700(a)(2)(iii) (first sentence)	Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.
5.747(a)(2)	3.700(a)(2)(iv)	
5.747(b)	3.700(a)(3)	
5.747(c)(1)	3.700(a)(5)(i) (first sentence)	
5.747(c)(2)	3.700(a)(5)(ii)	
5.747(d)	3.700(a)(2)(iii), 3.700(a)(3), 3.700(a)(5)(i)	
5.748	3.753	Concurrent receipt of VA disability compensation and retired pay by certain officers of the Public Health Service.
5.749		Reserved
Payments from Other Federal Agencies and the Effects of Those Payments on VA Benefits for a Veteran and Survivor		

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5.750(a)(1)	3.500(e) (second sentence), 3.658(a), 3.708(a)(1), 3.708(a)(4)	Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.
5.750(a)(2)	3.708(a)(2)	
5.750(b)	3.708(a)(3), 3.500(e) (second sentence)	
5.751(a)(1)	3.500(e) (second sentence), 3.708(b)(1) (first sentence)	Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to Federal civilian employment.
5.751(a)(2)	3.708(b)(1) (second sentence), 3.958	
5.751(b)(1) (last sentence)	3.500(e) (third sentence), 3.708(b)(2)	
5.751(c)	3.500(e) (second sentence), 3.708(b)(1) (second and third sentences (excluding intervening cross reference))	
5.751(d)	3.500(e) (second sentence)	

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5.751(e)(1) (last sentence)	3.500(e) (third sentence), 3.708(a)(3), 3.708(b)(1) (last sentence)	
5.752	3.400(f)	Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.
5.753	3.710	Payment of VA benefits and civil service retirement benefits for the same period.
5.754(a)	New	Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.
5.754(b), 5.754(c)	3.715	
5.754(d)	3.500(x)	
5.755		Reserved
Rules Concerning the Receipt of Multiple VA Benefits		
5.756	3.700 introductory text	Prohibition against

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		concurrent receipt of certain VA benefits based on the service of the same veteran.
5.757(a)	3.701(a) (first and second sentences)	
5.757(b)	3.701(a) (first and second sentences)	Elections between VA disability compensation and VA pension.
5.757(c)	3.701(a)	
5.757(d)	3.701(a) (first and third sentences)	
5.757(e)(1)	3.701(a) (first and fourth sentences)	
5.757(e)(2)	New	
5.757(e)(3)	3.701(a) (fifth sentence)	
5.757(f)	3.701(c)	
5.758(a)	3.711 (first sentence)	Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.
5.758(b)	3.711 (last sentence)	
5.758(c)	3.960(a)	
5.758(d)	3.701(a) (fifth sentence)	
5.759(a)(1)(i)	3.702(a)	Election between death

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5.759(a)(1)(ii)	3.702(d)(1)	compensation and dependency and indemnity compensation
5.759(a)(2)	3.702(a)	
5.759(b)	3.702(c)	
5.760	3.702(d)(2)	Electing Improved Death Pension instead of dependency and indemnity compensation
5.761	3.658(b), 3.700(b)(1)	Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.
5.762(a), 5.762(b)	3.700(b)(2)	Payment of multiple benefits to a surviving child based on the service of more than one veteran.
5.762(c)	3.503(a)(7), 3.659, 3.703	
5.763	3.704(a)	Payment of multiple benefits to more than one child based on the

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		service of the same veteran.
5.764(a)	3.503(a)(8), 3.659(b), 3.703(c), 3.707(a)	Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.
5.764(b)-(d)	3.707	
5.765	3.700(b)(3)	Payment of compensation to a parent based on the service or death of multiple veterans.
5.766-5.769		Reserved
Subpart M – Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries		
Determining Eligibility for Apportionments		
5.770	3.450 (except 3.450(f), (g))	Apportionment claims.

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5.771	3.451	Special apportionments..
5.772(a)	3.452(a)	Veteran's benefits apportionable.
5.772(b)	3.452(b)	
5.772(c)	3.452(c), 3.454(b) (except (b)(2))	
5.772(d)	3.452(d)	
5.773	3.453	Veterans disability compensation.
5.774 (except 5.774(e)(2))	3.458	Benefits not apportionable.
5.774(e)(2)	3.503(a)(2)	
5.775-5.779		Reserved
5.780(a)	3.450(a)(1)(ii)	Eligibility for apportionment of pension.
5.780(b)(1)	3.460(b)	
5.780(b)(2)	3.460(c)	
5.781(a)	3.461(a)	Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.
5.781(b)	3.461(b)(1)	
5.782(a)	3.400(e)(1) 3.400(e) (introduction)	Effective date of

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5.782(b)(1)	New	apportionment grant or increase.
5.782(b)(2)	3.400(e)(2)	
5.782(b)(3)	3.665(f)	
5.782(b)(4)	3.500(d)(1)	
5.783(a)	3.500(g)(1), 3.500(n)(1)	Effective date of apportionment reduction or discontinuance.
5.783(b)(1)	3.500(g)(2)(ii), 3.500(n)(2)(ii)	
5.783(b)(2)	New	
5.783(b)(3), 5.783(b)(4)	3.1000(b)(2)	
5.784(a)	3.1000(b)(1)	Special rules for apportioned benefits on death of beneficiary or apportionee.
5.784(b)(1)	3.1000(b)(3)	
5.784(b)(2)		
5.785-5.789		Reserved
Incompetency and Payments to Fiduciaries and Minors		
5.790(a)	3.353(a)	Determinations of incompetency and competency.
5.790(b)	3.353(b)	
5.790(c)	3.353(c)	
5.790(d)	3.353(d)	

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5.790(e)	3.353(e)	
5.790(f)(1)	3.400(x)	
5.790(f)(2)	3.400(y)	
5.791(a)	3.850(a)	
5.791(b)	3.850(c)	
5.791(c)	3.580(b)	General fiduciary payments.
5.791(d)	3.850(d)	
5.791(e)	3.400(n), 3.500(m)	
5.792(a)	3.852(a)	
5.792(b)	3.852(b), 3.852(d) (first sentence)	
5.792(c)	3.852(d) (second sentence)	Institutional awards.
5.792(d)	3.852(c)	
5.792(e)	3.401(d)	
5.792(f)	3.501(j)	
5.793(a)	3.403(a)(2), 3.854	
5.793(b)	3.403(a)(2)	Limitation on payments for a child.
5.794	3.855	Beneficiary rated or reported incompetent.
5.795	3.856	Change of name of

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		fiduciary.
5.796	3.857	Child's benefits to a fiduciary of an incompetent surviving spouse.
5.797	3.355	Testamentary capacity for VA insurance purposes.
5.798	3.853(c)	Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded $25,000.
5.799-5.809		Reserved
Payments to Incarcerated Beneficiaries		
5.810(a)	3.665(b)	Incarcerated beneficiaries – general provisions and definitions.
5.810(b)	New	
5.810(c)	3.665(a), 3.665(g), 3.666 introductory text	
5.810(d)	New	
5.810(e)	3.665(a), 3.666	

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	(introduction)	
5.810(f)	3.665(a), 3.666 introductory text	
5.811(a)	3.665(a), 3.665(c)	Limitation on disability compensation during incarceration.
5.811(b)	3.665(j)(3)(ii), 3.665(k)	
5.811(c)	3.665(d)(1), 3.665(d)(2), 3.665(j)	
5.812(a)	3.665(a), 3.665(c)	Limitation on dependency and indemnity compensation during incarceration.
5.812(b)	3.665(d)(3)	
5.812(c)	3.665(l)	
5.812(d)	3.665(k)	
5.813(a)	3.666 introductory text	Discontinuance of pension during incarceration.
5.813(b)	3.666(d)	
5.814(a)(1)	3.665(a)	Apportionment when a primary beneficiary is incarcerated.
5.814(a)(2)	3.665(h)	
5.814(b)	3.665(e)	
5.814(c)	3.666(a)(1)-(3)	
5.814(d)	3.666(b)(1), 3.666(b)(2), 3.666(b)(4)	
5.814(e)	3.665(f), 3.666(a)(4), 3.666(b)(3)	

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5.815(a)	3.665(i)	Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.
5.815(b)	3.665(i)(1), 3.665(i)(3)	
5.815(c)	3.665(i)(2), 3.665(i)(3)	
5.815(d)	3.665(m)	
5.816	3.666(c)	Resumption of pension upon a beneficiary’s release from incarceration.
5.817(a)	3.665(n)(1), 3.666(e)(1)	Fugitive felons.
5.817(b)	3.665(n)(2), 3.665(n)(3), 3.666(e)(2), 3.666(e)(3)	
5.818		Reserved
5.819		Reserved

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