



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 8

RIN 2900-AQ03

Eligibility for Supplemental Service-Disabled Veterans' Insurance.

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations governing the Service-Disabled Veterans' Insurance (S-DVI) program in order to explain that a person who was granted S-DVI as of the date of death under is not eligible for supplemental S-DVI because the insured's total disability did not begin after the date of the insured's application for insurance and while the insurance was in force under premium-paying conditions.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to: Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026 (this is not a toll-free telephone number). Comments should indicate that they are submitted in response to "RIN 2900-AQ03—Eligibility for Supplemental Service-Disabled Veterans' Insurance." 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 Federal holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free telephone number). In addition, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Paul Weaver, Department of Veterans Affairs Insurance Center (310/290B), 5000 Wissahickon Avenue, Philadelphia, PA 19144, (215) 842-2000, ext. 4263 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Under 38 U.S.C. 1922(a), a veteran "suffering from a disability or disabilities for which compensation would be payable if 10 per centum or more in degree and except for which such person would be insurable according to the standards of good health" is eligible for S-DVI up to a maximum of \$10,000 upon "application in writing made within two years from the date service-connection of such disability is determined by the Secretary and payment of premiums as provided in this subchapter." See 38 U.S.C. 1903 (amount of insurance). Section 1922(b) of title 38, United States Code, provides in pertinent part that a veteran who qualifies for insurance under 38 U.S.C. 1922(a) but who did not apply for such insurance and who was mentally incompetent from a service-connected disability, remained mentally incompetent until the date of death, and died before the appointment of a guardian or within 2 years after the appointment of a guardian "shall be deemed to have applied for and to have been granted such

insurance, as of the date of death." See 38 U.S.C. 1922(b). VA refers to insurance provided under 38 U.S.C 1922(b) as "gratuitous" insurance.

"Any person insured under section 1922(a) [of title 38, United States Code,] who qualifies for a waiver of [S-DVI] premiums under [38 U.S.C.] 1912 . . . is eligible" for supplemental S-DVI of up to \$30,000. 38 U.S.C. 1922A(a). Section 1912(a) of title 38, United States Code, states in pertinent part:

[P]ayment of premiums on insurance may be waived during the continuous total disability of the insured... if such disability began...after the date of the insured's application for insurance, [and]... while the insurance was in force under premium-paying conditions...[.]

In *Martin v. Shinseki*, 26 Vet. App. 451, 458 (2014), the U.S. Court of Appeals for Veterans Claims (Veterans Court) held that a person granted S-DVI "as of the date of death" under section 1922(b) satisfies the first requirement for supplemental S-DVI in 38 U.S.C. 1922A(a), i.e., insurance under 38 U.S.C. 1922(a), because a grant of S-DVI under section 1922(b) is treated, by operation of law, as an award of the insurance under section 1922(a). However, the Veterans Court also held that a person granted S-DVI under section 1922(b) is not eligible for supplemental S-DVI because the following two requirements for a premium waiver in section 1912(a) cannot be satisfied. First, the total disability of a person insured under S-DVI under 38 U.S.C. 1922(b) began before rather than after the date of application for S-DVI because as provided in the statute, the person is "deemed to have applied for and to have been granted such insurance[] as of the date of death." See *Id.* at 458-59. Second, the insured's total disability did not begin while the S-DVI was in force under premium paying conditions

because as explained above, the person was granted S-DVI as of the date of death under section 1922(b) and therefore, the insured would not have been required to pay premiums. See *Id.* at 459.

VA proposes to add section 8.34 to title 38, Code of Federal Regulations, which would codify the last two *Martin* holdings by explaining that a grant of supplemental S-DVI is precluded if S-DVI was granted under section 1922(b). This would reflect the Veterans Court's conclusion that the insured cannot qualify for a waiver of premiums under 38 U.S.C. 1912(a) because the insured's total disability did not begin after the date of the insured's application for insurance and while the insurance was in force under premium-paying conditions.

VA's proposed regulation would promote the continued viability of the S-DVI program. The S-DVI program is not self-supporting because S-DVI insureds pay standard premium rates which account for age but not their disabilities. See 38 U.S.C. 1922(a) (computation of premium rates). As a result, the S-DVI program requires an annual subsidy from the U.S. Treasury. VA's budget submission for FY 2017 requested an appropriation of \$77.6 million. VA estimates that, if veterans' beneficiaries were entitled to receive both gratuitous S-DVI and supplemental S-DVI for which no premiums were paid due to the death of the insured, the costs to the S-DVI program would increase by more than \$1 million per year.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures would be authorized. All existing or subsequent VA guidance would be read to conform with this rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

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 proposed regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at www.regulations.gov, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at www.va.gov/orpm by following the link for "VA Regulations Published."

Paperwork Reduction Act

This action contains no provision constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521); no new or proposed revised collections of information would be associated with this proposed rule.

Regulatory Flexibility Act

The Secretary hereby certifies that the adoption of this rule would 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 rule would directly affect only individuals and would not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

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 rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.103, Life Insurance for Veterans.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on August 15, 2017, for publication.

Dated: August 15, 2017

Jeffrey Martin
Office Program Manager
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

List of Subjects in 38 CFR Part 8

Life insurance, Veterans

For the reasons stated in the preamble, VA proposes to amend 38 CFR part 8 as set forth below:

PART 8—NATIONAL SERVICE LIFE INSURANCE

1. The authority citation for part 8 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, 1901-1929, 1981-1988, unless otherwise noted.

2. Adding new section 8.34 to read as follows:

§ 8.34 – Ineligibility for insurance under section 1922A of title 38, U.S.C. (supplemental Service-Disabled Veterans' Insurance) if person insured under section 1922(b) of title 38, U.S.C.

A person who is granted Service-Disabled Veterans' Insurance under 38 U.S.C. 1922(b) is not eligible for supplemental Service-Disabled Veterans' Insurance under 38 U.S.C. 1922A.

(Authority: 38 U.S.C. 1912, 1922, 1922A)

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