



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: Final rule.

SUMMARY: The Department of Veterans Affairs (VA), in this final rule, amends 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 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: This rule is effective [Insert date that is 30 days after date of publication in the FEDERAL REGISTER].

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:

On August 23, 2017, VA published a proposed rule in the Federal Register (82 FR 39974). VA provided a 60-day comment period on the proposed rule, which ended on October 23, 2017. VA received comments from five individuals. The commenters stated that they believed the proposed rule would unnecessarily restrict eligibility for supplemental S-DVI; eliminate insurance coverage for veterans; and is contrary to the congressional intent of the supplemental S-DVI legislation. We address their contentions below.

A. Insurance Coverage

One commenter stated that the rule would eliminate insurance coverage for many veterans. The regulation does not eliminate insurance coverage for insured veterans or those eligible to be insured under supplemental S-DVI. Rather, the rule clarifies VA's longstanding practice, which is dictated by 38 U.S.C. 1912(a) and 1922A(a), by explaining which veterans are ineligible for supplemental S-DVI consistent with the governing statutes. See *Martin v. Shinseki*, 26 Vet. App. 451 (2014). Therefore, VA will not make any changes based on this comment.

B. Eligibility for Supplemental S-DVI

Four commenters stated that the rule would restrict eligibility for supplemental S-DVI. Two of the commenters stated that the rule makes a blanket assessment that a mentally incompetent veteran is ineligible for supplemental S-DVI based on the assumption that the veteran would not have applied for the coverage. Another commenter stated that the rule discriminates against veterans who are incapable of applying for supplemental S-DVI prior to their date of death.

The rule is not based upon any assumption nor does it discriminate against certain veterans. As VA explained in the proposed rule, under 38 U.S.C. 1922A(a), a S-DVI insured is not entitled to supplemental S-DVI unless the insured qualifies for waiver of premiums under 38 U.S.C. 1912(a), and a veteran granted insurance under 38 U.S.C. 1922(b) cannot qualify for a waiver of premiums under § 1912(a) because the insured's total disability does not begin after the date of the insured's application for insurance and while the insurance is in force under premium-paying conditions. See 82 FR 39975. While section 1922(b) grants S-DVI posthumously, Congress did not include provisions in section 1922A to grant supplemental S-DVI to the survivors of veterans who were unable to apply for the insurance prior to death. See *Martin*, 26 Vet. App. at 458-59. VA will not make any changes based on these comments.

Two commenters stated that VA should revise the rule to prevent abuses rather than to eliminate eligibility for Supplemental S-DVI for all veterans granted S-DVI under section 1922(b). Both commenters stated that the point of the *Martin* decision was to prevent abuse of the system. We see no reference in the court's decision for prevention of abuse. Rather, the court's holdings are based on the plain language of the statutes. See 26 Vet. App. 458-49. Any VA rule that is inconsistent with the statutes would be invalid. We therefore decline to make any changes to the rule on this basis.

C. Congressional Intent

One of the commenters suggested that the rule makes numerous veterans ineligible for supplemental S-DVI, which is inconsistent with the intent of Congress and VA. The Veterans Court found that the language of 38 U.S.C. 1912(a) and 1922A(a) is plain, 26 Vet. App. at 458, and therefore the literal language is the "sole evidence of the

ultimate legislative intent." See *Caminetti v. United States*, 242 U.S. 470, 490 (1917). Sections 1912(a) and 1922A(a) unambiguously provide that supplemental S-DVI is only available to a person insured under S-DVI who qualifies for a waiver of premiums under section 1912, which requires that an insured's total disability have begun after the date of the insured's application for insurance and while the insurance is in force under premium-paying conditions. The court did not disregard the limiting language of the statutes and neither may VA. Therefore, VA will not make any changes based on this comment.

Based on the rationale set forth in the Federal Register, VA adopts the proposed rule, without change, as a final rule.

Executive Orders 12866, 13563, and 13771

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 final 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 <http://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 <http://www.va.gov/orpm> by following the link for "VA Regulations Published." This rule is not an Executive Order 13771 regulatory action because the rule is not significant under Executive Order 12866.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that the adoption of this final 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 final rule would directly

affect only individuals and would not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final 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 final 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.

List of Subjects in 38 CFR Part 8

Life insurance, 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. Jacquelyn Hayes-Byrd, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on March 20, 2018, for publication.

Dated: April 23, 2018

Jeffrey M. Martin
Impact Analyst
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

For the reasons stated in the preamble, the Department of Veterans Affairs amends 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(a), 1901-1929, 1981, 1988, unless otherwise noted.

2. Add § 8.34 to read as follows:

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

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.

[FR Doc. 2018-08854 Filed: 4/26/2018 8:45 am; Publication Date: 4/27/2018]