



**DEPARTMENT OF VETERANS AFFAIRS**

**8320-01**

**38 CFR Part 3**

**RIN 2900-AP86**

**Active Service Pay**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations. One amendment would permit VA to suspend disability compensation payments upon receipt of notice from the Department of Defense (DoD) that the veteran has received, is receiving, or will begin to receive active service pay. This proposed change would reduce the financial impact on veterans associated with receipt of VA disability compensation and active service pay by allowing VA to make necessary adjustments as close in time to the receipt of active service pay as possible. VA also proposes an amendment to clarify how VA adjudicates benefit adjustments based on receipt of active service pay for certain types of service.

**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](http://www.Regulations.gov); by mail or hand-delivery to Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1064, 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-AP86 – Active Service Pay. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1064, 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, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Gabrielle Mancuso, Consultant, Regulations Staff (211D), Compensation Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** Section 5304(c) of title 38, United States Code, provides that “Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.” “Active service pay” is defined by VA at 38 CFR 3.654 as “pay received for active duty, active duty for training or

inactive duty training” and therefore encompasses both active duty and training pay. VA implements the statutory prohibition on receiving concurrent VA benefits and active service pay in current 38 CFR 3.700(a)(1). In order to reduce hardships for veterans and improve processing of benefits, VA proposes to amend the current procedural requirements related to the 60-day notice period and take immediate action to suspend compensation payments upon notice of receipt of active service pay from DoD when the veteran has received prior notice that the law prevents concurrent receipt of certain VA benefits and active service pay or VA has received a statement from the veteran indicating knowledge that concurrent receipt of VA benefits and active service pay is prohibited. This proposed change would only apply to compensation payments, not pension.

#### I. Current Regulation and Adjustment Process

Current 38 CFR 3.103 generally establishes the procedures for notice of law in the VA benefits system. In particular, § 3.103(b)(2) establishes procedures that VA must follow before an “award of compensation, pension or dependency and indemnity compensation” can be “terminated, reduced or otherwise adversely affected.” Importantly, VA must provide a veteran with notice of a proposed adverse action and 60 days to provide evidence showing why the adverse action should not be taken. VA continues to pay benefits during this 60-day period.

Current regulations provide exceptions for when VA may dispense with the 60-day notice requirement and terminate or reduce benefits at the same time it notifies a veteran of such action. One exception is specific to veterans who inform VA when they return to active duty or participate in training duty. Under 38 CFR 3.103(b)(3)(v), VA may take immediate action to suspend payment of VA benefits when the decision is “based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension.” In other words, when a veteran proactively notifies VA of his or her receipt of active service pay, VA may suspend benefits without waiting 60 days, thereby eliminating or reducing the overpayment that VA must collect from the veteran. VA proposes to expand this exception to include notice of receipt of active service pay from DoD. Not only would this proposal further eliminate or reduce overpayments VA must collect, it also reduces the reporting burden on veterans in cases where VA receives information directly from DoD.

#### *A. Overpayments*

“[T]he Secretary generally is required to recover erroneous VA payments,” including the overpayment of benefits. *Edwards v. Peake*, 22 Vet. App. 57, 59 (2008) (citing 38 U.S.C. 5314); see also VAOPGCPREC 1-2010 (Jan. 4, 2010). Section 5304(c) of title 38, United States Code, precludes concurrent receipt of VA compensation and active service pay. If VA pays benefits to a veteran for a period in which he or she is not entitled to receive them, including during the 60-

day notice period, VA must generally recover these overpayments. At present, the only way for VA to avoid the overpayment and resulting recoupment action is if the veteran provides VA a statement prior to the receipt of active service pay, which allows VA to immediately suspend benefit payments. See 38 CFR 3.103(b)(3)(v). Otherwise VA must provide a 60-day response period prior to suspending benefits. Only upon expiration of the response period or a timely response from a veteran, whichever is sooner, may VA create an overpayment and initiate recoupment action. As discussed further in section II below, this process has created financial hardships for veterans, who must repay the duplicate benefits they received, as well as burdensome inefficiencies in processing overpayments, further amplifying the impact on veterans.

VA processes two basic types of benefit adjustments based on concurrent receipt of active service pay: training pay offsets, which can be performed either prospectively or retrospectively, and active duty suspensions. The respective processes for adjusting benefits differ. For training pay, DoD, until recently, transmitted an annual notice to VA with the number of days for which a veteran received training pay. Training pay is characteristically periodic and recurring, and of shorter duration than active duty pay. However, active duty pay, which DoD previously transmitted information about to VA quarterly, is typically of indeterminate duration that could extend months, or even years, particularly for members of the Reserves and National Guard returning to active duty. Because there are significant systemic differences in the processes for adjusting VA benefits based on receipt of either active duty or training pay, the processes for

adjusting benefits will be discussed separately to assist the reader with understanding the unique hardships created by each type.

### *B. Training Pay*

Training pay is the monetary benefit a reservist or member of the National Guard receives for performing periodic active duty for training, as discussed in more detail below, or inactive duty training. See 38 CFR 3.6(c) (active duty for training) and 3.6(d) (inactive duty training). During a single fiscal year, reservists and members of the National Guard commonly receive training pay for a total of 63 days, which consists of 48 drill periods (a drill period is defined as four hours), and 15 days of active duty training. Previously, at the end of each fiscal year, DoD's Defense Manpower Data Center (DMDC) sent VA an electronic file identifying veterans who received both training pay and VA disability compensation benefits during that fiscal year (ending in September). For data matches after the fiscal year (FY) 2017 match, VA will use the Reserve military pay data in the VA-DoD Identity Repository (VADIR) to match against VA recipients of VA disability compensation or pension. DMDC sends Reserve military pay data to VADIR monthly. DoD's provision, and VA's use of, DMDC data is based upon terms set forth in a computer matching agreement between DoD and VA. See Notice of a New Matching Program, 83 FR 51673 (Oct. 12, 2018).

VA may not learn of a veteran's receipt of training pay until the annual data match is received from DMDC. VA then sends each affected veteran VA Form 21-8951, Notice of Waiver of VA Compensation or Pension to Receive

Military Pay and Allowances, notifying the veteran that concurrent receipt of VA disability compensation or pension benefits and active service pay is prohibited, and that the veteran may use the form to elect to keep the training pay in lieu of VA compensation. If the veteran elects to keep the training pay, he or she must use the form to waive VA benefits for the number of days equal to the number of training days for which he or she received payment. Occasionally, a veteran will proactively notify VA of receipt (or anticipated receipt) of training pay by submitting VA Form 21-8951-2, Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances. Similar to VA Form 21-8951, this form allows a veteran to waive VA benefits or training pay. VA typically requires the signature of the veteran's military unit commander to ensure the number of days reported is accurate.

Both forms notify the veteran that if he or she elects to waive VA benefits in order to receive training pay, VA will adjust VA benefit payments for the total number of days waived. Generally, VA calculates the withholding at the monthly benefit rate in effect at the end of the fiscal year for which the veteran received training pay. Historically, VA withheld future compensation payments in lieu of creating an overpayment as an alternative mechanism of collecting the erroneous concurrent payments of training pay and VA compensation. However, adjustments by future withholding did not provide repayment options, leaving the veteran with no means to mitigate the adverse effect of losing the withheld benefits.

Consequently, starting in June 2016, VA began automating the annual process for training days completed in FY 2015. The new process is no longer dependent on employees initiating the adverse actions, which were previously delayed due to conflicting workload priorities. The automated process releases the notice letter upon receipt of notice from DMDC. After the veteran responds or the response period expires, VA issues a decision. If the decision results in an overpayment in the veteran's account, VA provides the veteran an opportunity to request a waiver of the overpayment or develop a payment plan to resolve the resulting debt. Subsequent data indicates that automation has increased the number of training pay adjustments processed by almost 62.9 percent from FY 2015 to FY 2016 while also reducing the number of days it takes to process the proposed compensation adjustment from 232 to 181 days, respectively. The average days to process the proposed compensation adjustment will continue to improve once the older training pay notices, received prior to the June 2016 automation process, are adjudicated. However, as discussed below, further improvement is possible.

### *C. Active Duty Pay*

A veteran may receive active duty pay as a result of returning to active duty in the United States Armed Forces. Additionally, VA treats some active duty for training in the same manner as active duty for purposes of processing VA benefit adjustments on the grounds that individuals performing such duty earn leave and time towards retirement on par to a servicemember on active duty status. Moreover, like active duty, some active duty for training can be of a

longer duration and may not necessarily have an ascertainable end date.

Therefore, active service pay for active duty for training described in 38 CFR 3.6(c), with the exception of annual active duty for training (typically performed 15 days each year by reservists and members of the National Guard) and Active Duty for Special Work to receive training, is generally processed as active duty pay for purposes of the cessation of VA compensation payments. Pay received for annual active duty for training and Active Duty for Special Work to receive training is processed as training pay. VA is proposing to amend 38 CFR 3.654(b) to accurately account for all instances in which VA discontinues an award, in the same manner as return to active duty, based on receipt of active service pay for active duty for training. See 38 U.S.C. 101(22) and 38 CFR 3.6(c).

VA's processing of concurrent VA benefits and active duty payments is generally different from processing of concurrent VA benefits and training pay. VA typically receives notice of a veteran's return to active duty or full-time duty in one of two ways: either written notice from a veteran or through a DMDC active duty, and on some occasions training pay, data match. While veterans returning to active duty or full-time duty can notify VA of their status, due to the fast-paced nature of some military deployments, or the fact that the veteran may be stationed in areas with limited mail service, VA frequently learns of a veteran's return to active duty through the DMDC active duty data match. The DMDC active duty data match differs from the data match described for training pay, as VA and DMDC previously conducted the active duty data match quarterly (i.e., approximately every 3 months). VA is in the process of developing a new

computer matching agreement with DoD that may change the frequency with which VA receives this information.

When the data match shows that a veteran has returned to active or full-time duty, VA will confirm the date of return by reviewing electronic VA and DoD shared databases, such as the Defense Personnel Records Image Retrieval System (DPRIS) or the Veterans Information Solution. After confirming a veteran's return to active or full-time duty, VA must, under current requirements, notify the veteran of VA's proposal to discontinue the payment of compensation or pension. VA sometimes encounters difficulties when trying to locate and contact veterans who have returned to active duty. As VA must notify a veteran of its intent to suspend disability payments, this becomes problematic when some veterans on active duty serve in remote locations, such as a combat zone or similarly austere environments, with infrequent mail service, and have no reasonable method for dealing with financial difficulties. VA's current regulations allow the veteran 60 days to respond to the proposed decision, submit evidence, and request a hearing before VA may suspend benefits. 38 CFR 3.103(b)(2). Following the end of the 60-day period, and provision of a hearing if requested, VA considers any relevant evidence, and, if warranted, discontinues the award of benefits effective the day preceding return to active or full-time duty. See 38 CFR 3.501(a) and 3.654(b).

## II. Undue Burdens to Veterans and Administrative Inefficiencies

Under current § 3.103(b), which we propose to amend, VA cannot suspend compensation benefit payments before the veteran responds to the proposed benefit adjustment or the expiration of the prescribed 60-day response period. During this period, a veteran who has returned to active duty continues to receive benefits that VA will be required to recoup. As such, in the case of a veteran who returned to active duty, the 60-day delay potentially harms the veteran by increasing the amount of the overpayment that VA must ultimately recover. Additionally, when a veteran is overpaid, VA is required to take “aggressive collection action ... to collect all claims for money or property arising from its activities.” See 38 CFR 1.910(a). This action can include disclosure of debt information to consumer reporting agencies. See 38 CFR 1.916. Collection and reporting of debt can negatively impact a veteran’s credit rating, ability to borrow money, or ability to qualify for a security clearance or a job.

As discussed below, VA believes that processing benefits adjustments on a more frequent basis will be beneficial to veterans. However, under current 38 CFR 3.103, depending on the frequency with which DMDC sends the electronic file to VA (see section III below), VA could potentially send multiple notice letters (up to 12 or more letters per year in the case of a veteran who regularly drills and multiple letters referring to the same period of service in the case of a veteran returning to active duty). This could result in overlapping notice periods and would create administrative inefficiencies associated with tracking and promulgating each action. For veterans who returned to active duty, it may be confusing to receive multiple notice letters related to the same period of service.

VA also encourages veterans to respond promptly to each letter to minimize the overpayment; however, a prompt response may be difficult, at best, and create an undue burden to those who may have returned to active duty and are in remote locations with infrequent mail service. The multiple notice letters could also create unnecessary distractions for veterans who may already be experiencing stressful situations in hostile areas and would likely create an influx of calls to VA's National Call Centers from veterans or their family members seeking assistance, clarification, or guidance.

Moreover, once VA issues a decision, the veteran receives one post-determination letter from the Veterans Benefits Administration (VBA) and, if an overpayment is created, a collections letter from VA's Debt Management Center. The first letter, from VBA, provides VA's decision, the summary of the evidence, and the veteran's appellate rights. The second letter is a collections letter from VA's Debt Management Center, which notifies the veteran of his or her rights and obligations, explains why the debt was created, and provides repayment options and waiver rights. In total, the veteran receives up to two post-determination notices for each adverse action. This indicates that even with the proposed removal of the response period and pre-determination letter, the veteran would still receive sufficient notice of VA's decision and the veteran's appellate rights, repayment options, and waiver rights.

### III. Future State of VA's Administrative Process

As discussed above, active service pay creates large compensation overpayments and burdensome reporting requirements for veterans. The data for FY 2016 indicates that the average overpayment was \$1,309.00 for training pay and \$5,545.00 for return to active duty. VA and DoD are presently discussing changes to the way VA receives notification that a veteran has received active service pay. VA would like to leverage technological advancements, such as the DMDC data discussed above, to process benefits adjustments based upon receipt of active service pay on a frequent and reoccurring basis. This would reduce large overpayments in cases of return to active duty. Additionally, VA believes that processing adjustments based on receipt of active service pay more frequently will minimize stress and financial impact on veterans by making adjustments as close in time to the receipt of the active service pay as possible. Veterans will also be able to more clearly associate the benefit adjustment with the receipt of training pay when it occurs closer in time, rather than having to recall the number of training days performed in the previous fiscal year. Moreover, processing adjustments more frequently helps VA identify veterans who may have returned to active duty or full-time duty, which is indicated, for example, when data shows a veteran performed more than 15 training days in a month. VA's current regulations, however, would remain an impediment to reducing or ending overpayments and bureaucratic inefficiencies because we must currently notify the veteran of VA's intent to suspend payments upon receipt of the DMDC data and wait 60 days for the veteran to respond before taking action.

Information received directly from DoD regarding a veteran's receipt of active service pay is sufficiently reliable for VA to initiate suspension of VA disability compensation to avoid or minimize overpayments. The data sent to DMDC is based on information from the Defense Finance and Accounting Service, which pays all DoD military personnel, providing the most current and accurate payment information. Amending 38 CFR 3.103(b)(3) to permit VA to suspend disability compensation payments upon receipt of notice from DoD that the veteran has received, is receiving, or will begin to receive active service pay would allow VA to take action immediately and with little likelihood of error, thus reducing or eliminating these overpayments. Additionally, the proposed rule reduces the number of notices a veteran receives, thus simplifying the process while still providing sufficient notice and appellate rights. This proposed regulatory amendment would provide better service to our veterans by eliminating the 60-day notice period (for veterans who received prior notice that the law prevents concurrent receipt of VA benefits and active service pay or from whom VA has received a statement indicating knowledge that concurrent receipt of VA benefits and active service pay is prohibited), thereby reducing potential overpayments and minimizing the financial impact on the veteran.

#### **IV. Due Process Concerns and Mitigating Risks**

As relevant here, the Fifth Amendment generally requires that an individual receive due process of law before being finally deprived of a property interest. See *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). In the context

of receipt of monetary government benefits, the Supreme Court has held that a pre-termination hearing is necessary before subsistence payments, such as welfare benefits, may be terminated. See *Goldberg v. Kelly*, 397 U.S. 254, 260-264 (1970). While the changes we propose here deal with suspension of monthly compensation payments rather than final termination, and with disability compensation rather than welfare payments, it is clear that suspending the payment implicates a valid property interest in continued receipt of the award.

However, the fact that due process of law applies does not mean that VA's current cumbersome procedures are constitutionally required. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."). Rather, the Supreme Court has made clear that "'due process' is a flexible concept [and] the processes required by the [Due Process] Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985).

VA believes that in the limited circumstance of temporary suspension of compensation payments based upon DoD notification that a veteran is in receipt of active service pay, constitutionally sufficient due process may be provided in a manner that does not unduly delay payment adjustments. To begin with, the inquiry that determines whether benefits must be suspended is straightforward: there is a clear statutory prohibition on receipt of compensation while a veteran is in receipt of active service pay. Further, this prohibition is only triggered by

factual information that is relatively clear, straightforward, and reliable, such as notice from DoD indicating a veteran has received active service pay. On its face, the risk of erroneous suspension in this context is low and would be mitigated, as is currently done by VA, by cross referencing identifiers (e.g., service number, social security number, date of birth).

Although VA is able to minimize the possibility of erroneous suspension of benefits, it has identified one primary scenario where benefits might be erroneously suspended due to the application of 10 U.S.C. 12316. This statute provides that a reservist called to active duty for a period of more than 30 days is precluded from receiving disability compensation “[u]nless the payments because of his earlier military service are greater than the compensation [payable for his current service].” See 10 U.S.C. 12316(b). Accordingly, it is theoretically possible that VA’s suspension of VA benefits, which exceeded the veteran’s active service pay, could adversely impact the veteran.

While this scenario is theoretically possible, VA views the probability of this occurring as extremely low. Nevertheless, VA has structured this proposed rule to include a safeguard to address the unlikely scenario by cross referencing VA disability compensation pay to DMDC pay to identify veterans who may be impacted. In the proposed rule, VA would specify that it will continue to require a statement directly from the veteran in order to suspend payment of compensation without advance notice and opportunity for a hearing “[w]hen notice provided by the Department of Defense contains information indicating that the monthly level of disability compensation for a veteran exceeds the veteran’s monthly active

service pay rate.” Further, we note that portions of 38 CFR 3.103 unaltered by this proposed rule would still provide the veteran with significant procedural protection that would allow VA to correct any errors. The amended regulation will still require VA to send a written notice to the veteran of the suspension at the time it takes the adverse action. See 38 CFR 3.103(b)(3). That notice must advise the veteran of the reasons for the decision and his or her right to appeal. See 38 CFR 3.103(f).

In sum, VA believes that the current 60-day waiting period, required by 38 CFR 3.103, when applied to the unique context of a veteran receiving active service pay, places unnecessary burdens on both the veteran and VA. Further, in this narrow situation, the 60-day waiting period protects against only a minimal risk of minor errors that can be mitigated or retrospectively corrected. The proposed amendments are beneficial to veterans and consistent with due process requirements.

#### V. Proposed Regulatory Amendments

For the reasons stated above, VA proposes to amend 38 CFR 3.103 to expand the existing exception in paragraph (b)(3)(v) so as to allow VA to suspend compensation benefits upon receipt of DoD notice that a veteran has received, is receiving, or will receive active service pay. The proposed amendment is intended to widen the exception created by paragraph (b)(3)(v) for suspension of compensation payments only and does not affect the process for suspending pension payments. VA’s experience shows that the vast majority of recoupment cases involve the overpayment of compensation, not pension,

benefits. Additionally, VA does not foresee that significant numbers of pension recipients will return to active service.

Therefore, this rule proposes to add the clause “or, in the case of compensation, written or electronic notice from the Department of Defense” in § 3.103(b)(3)(v), to dispense with tailored notice of VA’s proposed suspension of benefits and the 60 days traditionally provided to respond before VA makes the required adjustment. The proposed rule would reference receipt of active service pay, rather than return to active service, to account for the possibility that in certain circumstances, see 10 U.S.C. 12316, a veteran may return to service and still receive VA compensation. The proposed rule would require that the notice from the Department of Defense include the date on which the service resulting in receipt of active service pay began or is expected to begin or, in the case of training pay, the number of training days performed during a specified period of time. Additionally, the rule would note that the exception created by paragraph (b)(3)(v) can only be triggered when the veteran has received prior notice, or has submitted a statement to VA indicating knowledge, that receipt of active service pay precludes concurrent receipt of VA benefits.

We note that the fourth and final sentence of paragraph (b)(3)(v), as we propose to revise it, would ensure that VA continues to account for information indicating a veteran’s rate of disability compensation exceeds his or her rate of active duty pay. This sentence is designed to provide a procedural safeguard to minimize the possibility of erroneous suspension of benefits for any veterans who return to active duty but their monthly disability compensation exceeds their

monthly active service pay. The sentence would ensure that this rare classification of veteran has the opportunity to elect to receive disability compensation in lieu of active duty pay.

The amended regulation would include cross-references to 38 CFR 3.654, which includes VA's definition of active service pay and an explanation of how benefit adjustments based on receipt of active service pay are adjudicated, and 38 CFR 3.700(a)(1), which implements the statutory prohibition on receiving concurrent VA benefits and active service pay. As noted above, "active service pay means pay received for active duty, active duty for training or inactive duty training." See 38 CFR 3.654(a). Cross-referencing § 3.654 in amended 3.103(b)(3)(v) would ensure clarity with regard to the limited population to whom the exception to the notice response period applies. The amended language would also include a cross-reference to § 3.217(a), VA's policy regarding submission of statements or information affecting entitlement to benefits. Cross referencing § 3.217(a) would clarify that information affecting entitlement to benefits may be received by e-mail, facsimile, or other written electronic means to satisfy the requirement that the statement or information be submitted in writing.

VA proposes to amend 38 CFR 3.654(b) to include all circumstances in which VA processes benefit adjustments for pay received for active duty for training in the same manner as active duty pay in 3.654(b). This is due to certain types of active duty for training being on par with full-time active duty due to that duty being of longer duration and not necessarily having an ascertainable end

date. Therefore, an award will be discontinued effective the day preceding reentrance into active duty or active duty for training and payments, if otherwise in order, will be resumed as described in 38 CFR 3.654(b)(2). The types of active duty for training included are those described in § 3.6(c), with the exception of annual active duty for training typically performed 15 days each year by reservists and members of the National Guard and Active Duty for Special Work to receive training, which are processed as training pay. VA proposes a corresponding amendment to 38 CFR 3.654(c) to clarify the types of active duty for training that are processed as training pay.

VA also proposes to amend the first sentence of 38 CFR 3.654(b) to replace the reference to return to active duty status with a reference to receipt of active service pay to account for the possibility that in certain circumstances, see 10 U.S.C. 12316, a veteran may return to service and still receive VA compensation. VA additionally proposes to amend the final sentence of 38 CFR 3.654(b)(1) for clarity. The revised sentence will clarify that when the exact date of reentrance to active duty is not known, payments will be discontinued effective date of last payment, and the effective date of discontinuance will be adjusted to the day preceding reentrance when the date of reentrance has been ascertained from the service department. Finally, VA proposes to add an authority citation at the end of 38 CFR 3.654 because the section does not currently have an authority citation.

*Executive Orders (E.O.) 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 regulatory action have been examined and it has been determined not to be a significant regulatory action under E.O. 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 this 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 From FY 2004 Through Fiscal Year to Date.

This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

#### *Regulatory Flexibility Act*

The Secretary hereby certifies that this proposed rule 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 rule will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking 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 one year. This proposed rule will have no such effect on State, local, and tribal governments, or on the private sector.

### *Paperwork Reduction Act*

This action contains provisions constituting a collection of information, at 38 CFR 3.151, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521). There are no new collections of information associated with this proposed rule, but there will be a reduction in the number of respondents associated with an approved Office of Management and Budget (OMB) control number. The information requirement for 38 CFR 3.103 is currently approved by the Office of Management and Budget (OMB) and has been assigned control numbers 2900-0747 and 2900-0463. This proposed rule would reduce the number of respondents from the existing information collection requirements associated with this action at 38 CFR 3.654, Active service pay. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), while the actual OMB control number will remain in existence due to other information collections on the same OMB control number that are approved and active, it reduces the respondent burden for the approved OMB control number, 2900-0463. As a result of this proposed rule, there would be a reduction in the information collection burden that is associated with it. For 38 CFR 3.654, Active service pay, which is included on OMB control number 2900-0463, this would result in a reduction of 3,465 estimated annual burden hours and an annual cost savings of \$84,338.10. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit this information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal Register document.

### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

### **List of Subjects in 38 CFR Part 3**

Administrative practice and procedure, Claims, Disability benefits, Veterans.

### Signing Authority

The Secretary of Veterans Affairs 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on April 10, 2019, for publication.

Dated: April 12, 2019.

**Jeffrey M. Martin,**  
*Assistant Director,  
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 proposes to amend 38 CFR part 3 as set forth below:

**PART 3 – ADJUDICATION**

**Subpart A – Pension, Compensation, and Dependency and Indemnity**

**Compensation**

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

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

2. Amend § 3.103 by revising paragraph (b)(3)(v) and adding a cross references paragraph to the end of the section to read as follows:

**§ 3.103 Procedural due process and other rights.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(v) An adverse action based upon a written or electronic statement provided to VA by a veteran, or, in the case of compensation, written or electronic notice from the Department of Defense, which indicates that the veteran has received, is in receipt of, or will receive active service pay as defined by § 3.654(a). The statement from the veteran or notice from the Department of Defense must include the date on which the service resulting in receipt of active service pay began or is expected to begin or, in the case of training duty, the number of training days performed during a specified period of time (e.g., last month, last quarter, last year, etc.). In order for this paragraph to apply, the veteran must have received prior notice that receipt of active service pay

precludes concurrent receipt of VA benefits or VA must have received a statement from the veteran which indicates knowledge of such preclusion. When notice provided by the Department of Defense contains information indicating that the monthly level of disability compensation for a veteran exceeds the veteran's monthly active service pay rate, the exception contained in this paragraph will only apply to a written or electronic notice provided to VA by the veteran.

\* \* \* \* \*

CROSS REFERENCES: Submission of statements or information affecting entitlement to benefits. See § 3.217(a). Active Service Pay. See § 3.654. General. See § 3.700(a)(1).

3. Amend § 3.654 by revising paragraphs (b) and (c) and adding an authority citation to the end of the section to read as follows:

**§ 3.654 Active service pay.**

\* \* \* \* \*

(b) *Active duty or active duty for training.* (1) Where the veteran receives active service pay as a result of returning to active duty status or active duty for training as described in § 3.6(c), with the exception of annual active duty for training typically performed 15 days each year by reservists and members of the National Guard and Active Duty for Special Work to receive training (see paragraph (c) of this section), the award will be discontinued effective the day preceding reentrance into active duty or active duty for training status. If the exact date is not known, payments will be discontinued effective date of last

payment, and the effective date of discontinuance will be adjusted to the day preceding reentrance when the date of reentrance has been ascertained from the service department.

(2) Payments, if otherwise in order, will be resumed effective the day following release from active duty or active duty for training if claim for recommencement of payments is received within 1 year from the date of such release; otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in § 3.105. Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed. Disability will be evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. If a disability is incurred or aggravated in the second period of service, compensation for that disability cannot be paid unless a claim therefor is filed.

(c) *Training duty.* Prospective adjustment of awards may be made where the veteran waives his or her Department of Veterans Affairs benefit covering anticipated receipt of active service pay because of expected periods of active duty for training (annual active duty for training typically performed 15 days each year by reservists and members of the National Guard or Active Duty for Special Work to receive training) or inactive duty training. Where readjustment is in order because service pay was not received for expected training duty, retroactive payments may be authorized if a claim for readjustment is received within 1 year after the end of the fiscal year for which payments were waived.

(Authority: 38 U.S.C. 501(a) and 5304(c))

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