



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 9

RIN 2900-AQ49

Service Members Group Life Insurance - Definition of Stillborn Child for purposes of Coverage

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the regulation defining "member's stillborn child" for purposes of the Servicemembers' Group Life Insurance (SGLI) program. The current definition of a "member's stillborn child" is that a fetus must weigh at least 350 grams or, if the fetal weight is unknown, duration in utero is at least 20 completed weeks of gestation. VA proposes to amend the definition to allow reliance upon the fetus' gestational age even if the fetus' weight is known. As a result, a fetus whose duration in utero is 20 completed weeks of gestation but who weighs less than 350 grams would qualify as a "member's stillborn child."

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 <http://www.Regulations.gov>; by mail or hand-delivery to: Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., 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-AQ49 - Servicemembers' Group Life Insurance, Definition of Stillborn Child.”

All 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 telephone number.) In addition, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ruth Berkheimer, Insurance Specialist, Department of Veterans Affairs Insurance Center (310/290B), 5000 Wissahickon Avenue, Philadelphia, PA 19144, (215) 842-2000, ext. 4275. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Veterans' Survivor Benefits Improvements Act of 2001, Public Law 107-14, § 4, 115 Stat. 25, 26-28, authorized automatic insurance coverage for spouses and dependent children of servicemembers (hereinafter “servicemembers” or “members”) enrolled in Servicemembers' Group Life Insurance (SGLI). This insurance is referred to as Family Servicemembers' Group Life Insurance (FSGLI), which provides a maximum of \$100,000 of coverage for a spouse, not to exceed the servicemember's SGLI coverage amount, and \$10,000 for each dependent child. The servicemember pays the premium for spousal coverage, while dependent children are insured at no cost. Members cannot decline or reduce coverage for dependent children if the member is insured under SGLI. See 38 U.S.C. 1967(a)(3)(B). Dependent child coverage begins on the date of birth or, "if the child is

not the natural child of the member, the date on which the child acquires status as an insurable dependent of the member." 38 U.S.C. 1967(a)(5)(F).

Section 402 of the Veterans' Benefits Improvement Act of 2008, Public Law 110-389, 122 Stat. 4145, 4174, expanded the definition of "insurable dependent" for SGLI purposes to include a "member's stillborn child." On November 18, 2009, VA added paragraph (k)(1) to 38 CFR 9.1 to define the term "member's stillborn child" for purposes of SGLI coverage to mean:

A member's natural child –

- (i) Whose death occurs before expulsion, extraction, or delivery; and
- (ii) Whose –
 - (A) Fetal weight is 350 grams or more; or
 - (B) If fetal weight is unknown, duration in utero is 20 completed weeks of gestation or more, calculated from the date the last normal menstrual period began to the date of expulsion, extraction, or delivery.

74 FR 59,478, 59,479 (Nov. 18, 2009). (The word "natural" was changed to "biological" in 2012. 77 FR 70374, 70376 (Nov. 26, 2012).) VA promulgated this definition pursuant to S. Rep. No. 110-449, at 41 (2008), which stated that the "Committee expects VA to . . . define the term ["stillborn child"] . . . consistent with the 1992 recommended reporting requirements" of fetal deaths of the Model State Vital Statistics Act and Regulations as drafted by the Centers for Disease Control and Prevention's National Center for Health Statistics. *Id.* at 59,478. Since the rule was promulgated in 2009, VA has been asked to reevaluate the stillbirth standard by servicemembers

whose claims have been denied because the fetus did not meet the minimum weight of 350 grams but was 20 weeks or more in gestation.

Although the 1992 Model Act recommended the reporting requirements for fetal death, states have the authority enact their own reporting requirements, and as a result, the reporting criteria for fetal death enacted by states vary as to birth weight and gestational age. MacDorman MF, *Fetal and Perinatal Mortality: United States, 2013*. NATL VITAL STAT REP 2015 Jul; 64(8), Table I. We believe that only three states, Delaware, Montana, and Texas, currently use the criteria for reporting fetal deaths in the 1992 Model Act. DEL. CODE ANN. tit. 16, § 3124 (2019); MONT. CODE ANN § 50-15-403(1) (2019); 25 TEX. ADMIN. CODE § 181.7(a) (2019). We note that, nonetheless, Montana defines a "stillbirth" as a fetal death occurring after 20 weeks of gestation. MONT. CODE ANN § 50-15-101(15) (2019). Most states require either that a death be reported if a fetus is 20 weeks of gestation or 350 grams, or if it is 20 weeks of gestation. *Fetal and Perinatal Mortality: United States, 2013*, Table I. In addition, the American Academy of Pediatrics (AAP) Committee on Fetus and Newborn, uses the term "stillborn" to describe fetal deaths at 20 weeks' gestation or more, without regard to a fetus' weight. Barfield WD, Committee on Fetus and Newborn. Clinical Reports-- Standard Terminology for Fetal, Infant, and Perinatal Deaths. PEDIATRICS 2011 Jul; 128(1): 177-81.

The cutoff of 350 grams is the 50th percentile for weight at 20 weeks of gestation. *American College of Obstetricians & Gynecologists (ACOG) Practice Bulletin No. 102: Management of Stillbirth*. OBSTET GYNECOL. 2009 Mar;113(3):748-6. There are many variables that may account for a fetus' gestational weight, e.g., mother's health,

nutrition, height, weight, parity, race, ethnicity, tobacco use, and congenital anomalies. Buck Louis GM, *Racial/Ethnic Standards for Fetal Growth, the NICHD Fetal Growth Studies*. AM J OBSTET GYNECOL 2015 Oct.; 213(4): 449.e1-449.e41; Gardosi J, *A customized standard to assess fetal growth in a US population*. AM J OBSTET GYNECOL 2009 Jul; 201: 25.e1-7; Diego MA, *Prenatal depression restricts fetal growth*. EARLY HUM DEV. 2009 Jan.; 85(1): 65-70; Alexander GR, *1994-1996 U.S. Singleton Birth Weight Percentiles for Gestational Age by Race, Hispanic Origin, and Gender*. MATERN CHILD HEALTH J 1999; 3(4) 225-31. We believe that reliance on a fetus' gestation only in cases in which the fetus' weight is unknown creates inequities because a fetus may weigh less than 350 grams due to these factors but nonetheless be 20 weeks of gestation. We therefore propose to amend the criteria in § 9.20(k)(1) to include a larger cohort of stillborn children.

As part of VA's research, VA contacted obstetrics and gynecology professionals about the FSGLI stillbirth criteria to obtain their input. The organizations contacted were the American Board of Obstetrics and Gynecology (ACOG), VA Women's Health Services, Children's Hospital of Philadelphia, VA Palo Alto Health Care System, and Stanford University School of Medicine. The responses received indicated that revising the portion of the current definition of stillborn child in 38 CFR 9.1(k)(1)(ii) to provide that either a weight of 350 grams **or** a gestation period of 20 weeks or greater in utero irrespective of the fetus' weight would be in keeping with current, sound medical understanding of pre-term infants. A physician from the ACOG stated that "VA offers a valuable benefit to families who experienced a stillbirth, and I encourage VA to use a more expansive definition to determine which fetal loss would be covered." Similarly,

medical professionals from the Children's Hospital of Philadelphia, Division of Neonatology, stated that, "using either the weight criteria or the gestational age criteria ... to qualify is very reasonable as those targets would capture a lower limit of viability."

Given that the vast majority of states require reporting the death of a fetus at 20 weeks of gestation without regard to weight; the AAP describes the term "stillbirth" as fetal deaths of 20 weeks of gestation or more; and the inequities that result from reliance on a fetus' gestation only in cases in which the fetus' weight is unknown, VA proposes to eliminate the requirement in 38 CFR 9.1(k)(1)(ii)(B) that VA may rely on a fetus' gestational period only in cases in which the fetus' weight is unknown. Section 9.1(k)(1) would instead provide that a member's biological child whose death occurs before expulsion, extraction, or delivery and who meets either component of the definition, *i.e.*, fetal weight is at least 350 grams **or** a gestation period of 20 completed weeks or greater in utero, calculated from the date the last normal menstrual period began to the date of expulsion, extraction, or delivery will satisfy the definition of a member's stillborn child.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive 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.

Paperwork Reduction Act

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

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

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,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, 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 to be a significant regulatory action under Executive Order 12866, because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. 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 from FY 2004 through Fiscal Year to Date." This proposed rule is not expected to be subject to the requirements of EO13771 because this proposed rule is expected to result in no more than *de minimis* costs.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed 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. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

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 Part 9

Life insurance, Military Personnel, 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on May 3, 2019, for publication.

Date: June 21, 2019

Luvenia Potts,
*Program Specialist,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs*

For the reasons stated in the preamble, VA proposes to amend 38 CFR part 9 as set forth below:

PART 9—SERVICEMEMBERS' GROUP LIFE INSURANCE AND VETERANS' GROUP LIFE INSURANCE

1. The authority citation for part 9 continues to read as follows:

Authority: 38 U.S.C. 501, 1965–1980A, unless otherwise noted.

2. Amend § 9.1 by revising paragraph (k)(1) to read as follows:

§ 9.1 Definitions.

* * *

(k)(1) The term *member's stillborn child* means a member's biological child—

(i) Whose death occurs before expulsion, extraction, or delivery; and

(ii) Whose -

(A) Fetal weight is 350 grams or more; or

(B) Duration in utero is 20 completed weeks of gestation or more, calculated from the date the last normal menstrual period began to the date of expulsion, extraction, or delivery.

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