



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AQ01

Reimbursement of Qualifying Adoption Expenses for Certain Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with changes based on subsequent statutory authority, an interim final rule providing for reimbursement of qualifying adoption expenses incurred by a veteran with a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment. Under the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, VA may use funds appropriated or otherwise made available to VA for the “Medical Services” account to provide adoption reimbursement to these veterans. Under the law, reimbursement may be for the adoption-related expenses for an adoption that is finalized after the date of the enactment of this Act under the same terms as apply under the adoption reimbursement program of the Department of Defense (DoD), as authorized in DoD Instruction 1341.09, including the reimbursement limits and requirements set forth in such instruction. This rulemaking implements the new adoption reimbursement benefit for covered veterans.

DATES: Effective date: This rule is effective on **[insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Patricia M. Hayes, Ph.D. Chief Consultant, Women’s Health Services, Patient Care Services, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420. (202) 461-0373. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Public Law 114-223, the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act (the “2017 Act”), section 260, allows VA to use appropriated funds available to VA for the Medical Services account to provide fertility counseling and treatment using assisted reproductive technology (ART) to a covered veteran or the spouse of a covered veteran, or adoption reimbursement to a covered veteran. On January 19, 2017, VA published an interim final rule at 82 FR 6275 addressing fertility counseling and treatment using ART, including in vitro fertilization (IVF) (which is a type of ART), for both covered veterans and spouses. On March 5, 2018, VA published an interim final rule to implement our authority to provide reimbursement of qualifying adoption expenses to covered veterans (83 FR 9208). The latter interim final rule was effective on the date of publication. The rule included a provision, consistent with funding authority under the 2017 Act, stating that authority to provide reimbursement for qualifying adoption expenses incurred by a covered veteran in the adoption of a child under 18 years of age expires September 30, 2018.

Following publication of the interim final rule Congress enacted a bill renewing and revising our authority to provide the adoption reimbursement benefit. While 2017 Act was the original authority for VA's adoption reimbursement program, it lapsed once the relevant funding period ended. VA's authority to provide reimbursement of qualifying adoption expenses to the same cohort described in the 2017 Act was subsequently renewed and extended in nearly identical form in Section 236 of Division J, Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2018, Public Law 115-141 (March 23, 2018) (the "2018 Act") and Section 235 of Division C, Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019, Public Law 115-244 (September 21, 2018) (the "2019 Act"). Under this most recent authority, VA's adoption expense reimbursement program remains subject to the funding period covered by the 2019 Act and the availability of appropriations.

When we published the interim final rule, we provided a 60-day comment period, which expired on May 4, 2018. We received 4 comments from the public, all of which were supportive of this rulemaking. However, the commenters raised several issues that we address here. We make no changes based on public comments. VA adopts as final, with changes based on subsequent statutory authority, an interim final rule providing for reimbursement of qualifying adoption expenses incurred by a veteran with a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment.

Per the 2017 Act, 2018 Act, and 2019 Act, veterans with a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment are authorized to receive reimbursement for certain adoption-related

expenses for an adoption that is finalized after September 29, 2016, (the date the 2017 Act was enacted) under the same terms as apply under the adoption reimbursement program of DoD, as authorized in DoD Instruction 1341.09, including the reimbursement limits and requirements set forth in that DoD policy. DoD Instruction 1341.09, “DoD Adoption Reimbursement Policy” (July 5, 2016) establishes policy, assigns responsibilities within DoD, and provides procedures for the reimbursement of qualifying adoption expenses incurred by members of the Military Services (including document submission requirements) pursuant to 10 U.S.C. 1052. That statute was enacted in 1991 and establishes the parameters of DoD’s adoption reimbursement program. The interim final rule added a new § 17.390 to provide for reimbursement of qualifying adoption expenses to covered veterans, consistent with the policies and procedures established by DoD in implementing 10 U.S.C. 1052.

Section 17.390(b)(1) states that no more than \$2,000 may be reimbursed under this section to a covered veteran, or to two covered veterans who are spouses of each other, for expenses incurred in the adoption of a child. In the case of two married covered veterans, only one spouse may claim reimbursement for any one adoption. Paragraph (b)(2) states that no more than \$5,000 may be paid under this section to a covered veteran in any calendar year. In the case of two married covered veterans, the couple is limited to a maximum of \$5,000 per calendar year.

One commenter suggested changing the reimbursement limits so two married covered veterans are not limited to the same reimbursement level of just a single covered veteran. The commenter recommended that in cases of two married covered veterans, they would have twice the benefit as a single covered veteran. Otherwise, a

married veteran whose non-veteran spouse received an adoption benefit from an employer would be at an advantage relative to two married veterans. The commenter stated that allowing the benefit to be limited to each veteran (and not per family) would place VA in a position of not disadvantaging veterans who are spouses of each other.

One commenter noted that under paragraph (b) funds are limited by time period rather than by child. The commenter stated that this limitation could discourage veterans who may wish to adopt older children who are siblings, keeping them together. The commenter recommended addressing the limitation on adoption expense reimbursement by child rather than per year.

As noted above, VA is required by statute to administer its adoption reimbursement program under the same terms as apply under the adoption reimbursement program of DoD, as authorized in DoD Instruction 1341.09, including the reimbursement limits and requirements set forth in that DoD policy. The DoD policy implements 10 U.S.C. 1052, which provides that servicemembers may request reimbursement up to \$2,000 per adoptive child or a maximum of \$5,000 per calendar year for qualifying expenses. In the case of two married military servicemembers, only one member may claim reimbursement and the couple is limited to a maximum of \$5,000 per calendar year. Our rule is consistent with these provisions. Per 38 CFR 17.390(a)(2), the application for reimbursement must be submitted no later than 2 years after the adoption is final or, in the case of adoption of a foreign child, no later than 2 years from the date a certificate of United States citizenship is issued. This is also consistent with the DoD policy. The only substantive difference in our program is that, per statute, VA may reimburse qualifying adoption expenses incurred by covered

veterans only for adoptions finalized after September 29, 2016, the date the 2017 Act was enacted. VA has no statutory authority to expand the program to allow two covered veterans who are spouses to each file an application for reimbursement of qualifying adoption expenses, or increase either the per-child or annual reimbursement limits. Likewise, we do not have the statutory authority to alter the time limits reflected in this rule. We make no changes based on these comments.

One commenter asked whether a Vietnam veteran rated at 100% service-connected disability based on conditions related to Agent Orange exposure who, since 1970, has been unable to father a child is eligible for reimbursement of qualifying adoption expenses. Eligibility for reimbursement of qualifying adoption expenses is not based on status as a combat veteran or a particular rating of a service-connected disability. Reimbursement of qualifying adoption expenses is available to covered veterans with a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment. Regardless of the disability rating or the cause of said disability, the veteran would be eligible for this benefit if the rated service-connected disability prevents the veteran from procreating without the use of fertility treatment. We make no changes based on this comment.

Finally, based on the 2019 Act, we remove paragraph (f) which provided that authority to provide reimbursement for qualifying adoption expenses incurred by a covered veteran in the adoption of a child under 18 years of age expires September 30, 2018. Under the most recent authority, VA's adoption expense reimbursement program remains subject to the funding period covered by the 2019 Act and the continuing availability of appropriations. However, Congress could again renew and extend this

authority. For this reason and to avoid the need to continually update these regulations when a subsequent appropriations law (or other law) renews this authority, we eliminated the section that specifies an expiration date. VA's ability to provide reimbursement will remain subject to the limitations provided in the applicable statutory provisions.

Based on the rationale set forth in the interim rule and in this document, VA adopts the interim final rule as a final rule, with a technical amendment consistent with enactment of the 2019 Act.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents 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 are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521). As required by 44 U.S.C. 3507(d), VA submitted this information collection to the Office of Management and Budget (OMB) for its review. OMB approved the new information collection

requirements associated with the final rule under a 6-month emergency clearance and assigned OMB control number 2900-0860. OMB control number 2900-0860 expired on March 31, 2019. VA has applied to OMB for a renewal of this information collection under a separate document and notice of OMB approval for this information collection will be published in a future Federal Register document.

Regulatory Flexibility Act

The Secretary hereby certifies that this final 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 final rule directly affects only individuals and 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 5 U.S.C. 603 and 604.

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. The Office of Information and Regulatory Affairs has determined that this rule is not 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 from FY 2004 through FYTD. This rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

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

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles affected by this document.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, 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. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on December 6, 2019, for publication.

Consuela Benjamin,
*Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,*

Department of Veterans Affairs.

For the reasons set forth in the preamble, the VA adopts the interim final rule amending 38 CFR part 17, which published on March 5, 2018 (83 FR 9208), as final with the following changes:

PART 17 – MEDICAL

1. The authority citation for part 17 is amended in the authority for §§ 17.380, 17.390 and 17.412 by adding, immediately after “857”, “and sec. 236, Pub. L 115-141, 132 Stat. 348” to read in part as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

* * * * *

§ 17.390 [Amended]

2. Amend § 17.390 by removing paragraph (f).

[FR Doc. 2019-26751 Filed: 12/12/2019 8:45 am; Publication Date: 12/13/2019]