



This document is scheduled to be published in the Federal Register on 12/21/2016 and available online at <https://federalregister.gov/d/2016-30509>, and on FDsys.gov

DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AP23

Special Monthly Compensation for Veterans with Traumatic Brain Injury

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) seeks to amend its adjudication regulations to add an additional benefit for veterans with residuals of traumatic brain injury (TBI). This benefit was enacted by the Veterans' Benefits Act of 2010 and provides special monthly compensation for veterans with TBI who are in need of aid and attendance and, in the absence of such aid and attendance, would require hospitalization, nursing home care, or other residential institutional care. Prior to the law's enactment, veterans with TBI were not eligible for this benefit unless they had a separate service-related disability that qualified under the law.

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, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026.

Comments should indicate that they are submitted in response to "RIN 2900-AP23 – Special Monthly Compensation for Veterans with Traumatic Brain Injury."

Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, 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, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Eric G. Mandle, Policy Analyst, 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: On October 13, 2010, the Veterans' Benefits Act of 2010, Public Law 111-275 (the Act) was signed into law. Section 601 of the Act amends 38 U.S.C. 1114, adding subsection (t) to include special monthly compensation (SMC) for veterans who as the result of service-connected disability, are in need of regular aid and attendance for the residuals of traumatic brain injury (TBI), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care. The law grants an additional monetary allowance for veterans with residuals of TBI who require this higher level of care but would not otherwise qualify for the benefit under 38 U.S.C. 1114(r)(2). The amendment became effective October 1, 2011.

VA administers SMC benefits under 38 CFR 3.350. Additionally, 38 CFR 3.352 provides the criteria to determine the need for aid and attendance and

whether a claimant is permanently bedridden; 38 CFR 3.552 requires adjustments of allowance for aid and attendance when a beneficiary is hospitalized. Internal guidance has been published since April 4, 2011, instructing VA offices engaged in claims adjudication on how to implement the new SMC provision, but a formal update to VA's adjudication regulations has not yet been published.

I. VA Interpretation of Public Law 111-275

Under this proposed rule, VA will directly implement 38 U.S.C. 1114(t), which states that an additional award of SMC is payable to a veteran who, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for additional compensation under 38 U.S.C. 1114(r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care. VA would also make clear that a veteran entitled to this benefit shall be paid during periods he or she is not hospitalized at United States Government expense as if receiving the amount equal to the compensation authorized under 38 U.S.C. 1114(o) or the maximum rate authorized under 38 U.S.C. 1114(p) and, in addition to such compensation, a monthly allowance equal to the rate described in 38 U.S.C. 1114(r)(2).

VA believes that there are two potential readings of the Act. Under the first, more restrictive reading, a veteran affected by section 1114(t) would receive only the rate noted under 38 U.S.C. 1114(r)(2), e.g., \$2,983, in addition to any other rate of special monthly compensation the individual in question might

happen to qualify for. Reading the Act in this way, however, would result in benefits that are less than the amount to which other veterans requiring the same level of care not related to TBI would be entitled. This is because the predicate rates built into section 1114(r), such as the rate authorized by subsection (o), the maximum rate authorized under subsection (p), or the intermediate rate authorized under subsections (n) and (o), will not typically be met for veterans suffering from TBI, rather than the other conditions enumerated in section 1114.

Under the second, more liberal interpretation of section 1114(t), VA would pay veterans who meet the criteria of section 1114(t) the full amount described by section 1114(r) (i.e., the rate authorized by subsection (o), which is also the maximum rate authorized under subsection (p), in addition to the allowance authorized by subsection (r)). The statutory language, viewed together with its purpose and legislative history, can be interpreted as establishing that Congress intended that veterans receiving the aid and attendance allowance authorized by subsection (r)(2) necessarily also qualify for the predicate rates described in subsection (r).

VA finds that Congress' intent was to enact a law that pays veterans of this class an amount equal to the compensation authorized under section 1114(o) or the maximum rate authorized under section 1114(p), plus the additional amount described under section 1114(r)(2). VA chose the rates permitted under section 1114(o) and (p) because those are the highest rates permitted under section 1114 and therefore would be the most favorable rates for this group of veterans requiring this higher level of care.

Textually, subsection (r) generally preconditions receipt of the heightened aid and attendance allowance under either subsection (r)(1) or (r)(2) on receipt of one of the predicate rates identified in subsection (r), which include the rates specified in (o) and (p). Additionally, subsection (r) makes clear that a veteran is receiving that heightened allowance “in addition to” the special monthly compensation otherwise described in subsection (r). VA has long interpreted subsection (r) as reflecting the assumption that a veteran is necessarily in receipt of one of the predicate rates described in the body of subsection (r) whenever a veteran is in receipt of the heightened aid and attendance allowance under either subsection (r)(1) or (r)(2). This interpretation is reflected in VA’s current regulations. See 38 CFR 3.352(b)(1) (higher level of aid and attendance authorized by 38 CFR 3.350(h) requires that the veteran be “entitled to the compensation authorized under [subsection (o),] or the maximum rate of compensation authorized under [subsection (p)].”).

In support of this interpretation, VA notes that 38 U.S.C. 1114(r)(2) provides additional compensation to those veterans with certain service-connected disabilities who are in need of a higher level of care. The legislative history for section 601 of Public Law 111-275 indicates that subsection (t) is intended to provide additional compensation to veterans with TBI who do not have those qualifying service-connected disabilities and therefore are not otherwise eligible for benefits under (r)(2), but still require a higher level of care comparable to what would otherwise be contemplated by the allowance provided by (r)(2). See S. Rep. No. 111-71, at 17 (2009) (discussing the intent to provide

the highest level of aid and attendance benefits to those veterans suffering from TBI).

VA also considers Congress' decision to link section 1114(t) benefits to the existing (r)(2) rate of compensation as evidence of Congress' intent to pay (t) aid and attendance at the rate commonly received by veterans entitled to (r)(2) payments. If Congress intended subsection (t) to confer a freestanding allowance, it is counterintuitive that Congress would link the allowance to (r)(2) rather than simply declaring that any veteran in need of regular aid and attendance for the residuals of TBI should receive a specified dollar amount. Instead, Congress chose to match the existing rate and aid and attendance requirements described under (r)(2). In so doing, Congress emphasized that the overall impairment and need for care are the same for those with TBI as they are for those with certain service-connected disabilities who require a higher level of aid and attendance. S. Rep. 111-71 at *18.

VA's interpretation of section 1114(t) would mean that the rate authorized by section 1114(o) and (p) is the "other compensation under this section" referenced in section 1114(t) for purposes of all cases under that section. We acknowledge that this interpretation imports a specific meaning to the term "other compensation" that is not apparent on the face of that term. We find that this interpretation is warranted because interpreting the phrase "other compensation under this section" to refer only to other compensation for which the veteran independently qualifies would defeat the purpose of the legislation. The legislative history noted that 38 U.S.C. 1114(l) prescribes the basic monthly

compensation amount for veterans in need of aid and attendance due to their service-connected disabilities and that section 1114(r)(2) prescribes an “additional” monthly amount payable for veterans in need of a higher level of care. S. Rep. 111-71 at *17. Congress thus recognized that the needs of veterans who qualify for the (r)(2) rate are met by payment of both a basic monthly SMC rate, which generally would be provided under subsections (l) through (p) of section 1114 and the heightened aid and attendance payment under (r)(2). Congress determined that legislation was needed to extend similar benefits to veterans with TBI because the provisions of section 1114 generally focus on physical disabilities and locomotion rather than cognitive or psychological impairments associated with TBI. S. Rep. 111-71 at *17-18.

For the reasons stated in the legislative history, cognitive disability due to TBI generally would not qualify for the basic monthly SMC rates prescribed in section 1114(l)-(p). As a result, if the term “other compensation under this section,” as used in section 1114(t) were construed to mean compensation for which the veteran otherwise qualifies without regard to section 1114(t), a substantial part of the benefits contemplated by (r)(2) – i.e., the basic monthly SMC rate – would be unavailable in most cases covered by section 1114(t). Such an interpretation would defeat the statute’s clear purpose in that it would, based on section 1114’s focus on physical disability, provide veterans covered by section 1114(t) with a monthly benefit well below the amount Congress has determined necessary to provide for the needs of veterans requiring a heightened level of care under (r)(2). Accordingly, we believe section 1114(t) is

most properly construed to permit payment of both the “additional” amount specified in (r)(2) and the predicate SMC rate specified in section 1114(o) and (p).

VA finds the language of the amended statute to be ambiguous, but has determined that Congress intended to provide veterans in need of aid and attendance due to TBI residuals the same level of compensation as veterans entitled to the section 1114(r)(2) rate. See Chevron, U.S.A., Inc. v Natural Res. Def. Council, Inc., 467 U.S. 837, 842-844 (1984) (if Congress has not addressed “the precise question at issue,” a court should defer to an administering agency’s construction of the statute so long as it is a “permissible” construction). VA believes its interpretation is the most logical one because it is unlikely that Congress would wish to bestow a lesser benefit on veterans with TBI than is applicable to veterans with certain service-connected disabilities that might otherwise qualify for the (r)(2) allowance, while simultaneously emphasizing that veterans with TBI may be in a functionally similar situation. This interpretation is also the most advantageous to veterans with TBI who require a higher level of care.

II. Regulatory Amendment Mechanics

This rulemaking proposes to amend § 3.350 by adding paragraph (j), proposes to amend § 3.352 by adding a new paragraph (b)(2) and revising the authority citation, and proposes to amend § 3.552(b) by adding a reference to 38 U.S.C. 1114(t) to paragraph (b)(2) and revising the authority citation. Proposed paragraph (j) will set forth the general criteria prescribed by 38 U.S.C. 1114(t).

Paragraph (j) would reference § 3.352 to provide guidance on determining the need for aid and attendance. Paragraph (j)(1) would provide that a veteran shall be entitled to the amount equal to the compensation authorized under 38 U.S.C. 1114(o) or the maximum rate authorized under 38 U.S.C. 1114(p) and, in addition to such compensation, a monthly allowance equal to the rate described in 38 U.S.C. 1114(r)(2) during periods he or she is not hospitalized at United States Government expense.

In addition, to ensure consistency with current § 3.350(h), VA proposes to reference revised § 3.552(b)(2) under proposed § 3.350(j)(1). Section 3.552(b)(2) requires VA to discontinue the aid and attendance benefit following hospitalization at government expense. Proposed § 3.350(j)(2) would note that an allowance under proposed paragraph (j) would be paid in lieu of any allowance authorized by 38 U.S.C. 1114(r)(1).

Section 3.352 governs the criteria for determining the need for aid and attendance and what is "permanently bedridden" for VA disability compensation purposes. VA proposes to amend § 3.352 to regulate entitlement to a higher level of aid and attendance allowance for residuals of TBI. Specifically, we propose to redesignate paragraphs (b)(2) through (b)(5) of § 3.352 as (b)(3) through (b)(6). Paragraph (b)(1)(iii) and newly redesignated paragraph (b)(4) of this section reference (b)(2). As such, those paragraphs would also be revised to reflect that (b)(2) would become (b)(3).

This rulemaking also proposes to add a new paragraph (b)(2) to § 3.352 stating that a veteran is entitled to the higher level of aid and attendance

allowance for residuals of TBI, as authorized by § 3.350(j), in lieu of the regular aid and attendance allowance. Entitlement would be found when the veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of the section and when the veteran needs a higher level of care (as defined in redesignated paragraph (b)(3) of the section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care would require hospitalization, nursing home care, or other residential institutional care.

As previously discussed, VA has determined that Congress intended 38 U.S.C. 1114(t) to provide total compensation equal to the total rate paid after factoring total compensation paid in (r)(2) cases, who also receive payment under subsections (o) or (p). VA therefore proposes to apply the same definition of a higher level of care when determining entitlement under proposed § 3.350(j) as VA applies under § 3.350(h). Specifically, VA proposes to require that veterans entitled to SMC under section 1114(t) establish entitlement to the regular aid and attendance allowance in paragraph (a) of § 3.352, as well as establish a requirement for a higher level of care, where, in the absence of the higher level of care, the veteran would require hospitalization, nursing home care, or other residential institutional care. These requirements mirror the current requirements for entitlement under § 3.350(h) and § 3.352(b). We would clarify in § 3.352(b)(2)(i) and (ii) that the need for this higher level of aid and attendance must be as a result of service-connected residuals of traumatic brain injury. This requirement is consistent with the statutory language which requires that the

veteran “as a result of service-connected disability, is in need of regular aid and attendance for the residuals of [TBI].” While the statutory language could be read to allow entitlement to section 1114(t) compensation to those veterans with any service-connected disability that also suffer from TBI residuals, VA believes that the phrase “as a result of” indicates Congress intended that the need for a higher level of aid and attendance for TBI residuals to be due to a service-connected disability. Further, the legislative history is clear that Congress intended section 1114(t) compensation to be provided to those veterans suffering from service-connected residuals of TBI. See Chevron, supra; see S. Rep. No. 111-71, at 17 (2009) (discussing that the committee bill “would allow veterans suffering from severe TBIs to receive the highest level of aid and attendance benefits from VA”). We would also amend the authority citation for § 3.352(b) to add section 1114(t).

Lastly, VA proposes to amend 38 CFR 3.552(b)(2). Section 3.552 regulates adjustments of allowance for aid and attendance. Specifically, paragraph (b)(2) states that “[w]hen a veteran is hospitalized at the expense of the United States Government, the additional aid and attendance allowance authorized by 38 U.S.C. 1114(r)(1) or (2) will be discontinued ...”. To ensure consistency in its regulations, and to implement the conforming amendment of the Act, VA is amending that paragraph to include 38 U.S.C. 1114(t). This amendment is supported by the plain language of the statute, which states “[s]ubject to section 5503(c) of this title.” Section 5503(c) of title 38 United States Code governs hospitalization of veterans and states, in effect, the rule we

propose to establish here. We would also amend the authority citation for § 3.552(b). The current authority citation cites 38 U.S.C. 5503(e); however, the Veterans Education and Benefits Expansion Act of 2001, Public Law 107-103, § 204(a), 115 Stat. 990, amended section 5503 by redesignating section 5503(e) as section 5503(c). Therefore, we would revise the authority citation to reflect the accurate legal authority as 38 U.S.C. 5503(c).

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” 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 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 this rulemaking and its impact analysis are available on VA’s Web site at <http://www.va.gov/orpm/>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

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). This proposed rule would directly affect only individuals and would 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, 2 U.S.C. 1532, requires 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.

Paperwork Reduction Act

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.109, Veterans Compensation for Service-Connected Disability.

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 December 13, 2016, for publication.

Dated: December 13, 2016

Jeffrey Martin
Office Program Manager
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 § 3.350 to add paragraph (j) to read as follows:

§ 3.350 Special monthly compensation ratings.

* * * * *

(j) Special aid and attendance benefit for residuals of traumatic brain injury (38 U.S.C. 1114(t)). The special monthly compensation provided by 38 U.S.C. 1114(t) is payable to a veteran who, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under 38 U.S.C. 1114(r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care. Determination of this need is subject to the criteria of § 3.352.

(1) A veteran described in this paragraph (j) shall be entitled to the amount equal to the compensation authorized under 38 U.S.C. 1114(o) or the maximum rate authorized under 38 U.S.C. 1114(p) and, in addition to such compensation, a monthly allowance equal to the rate described in 38 U.S.C. 1114(r)(2) during

periods he or she is not hospitalized at United States Government expense. (See § 3.552(b)(2) as to continuance following admission for hospitalization.)

(2) An allowance authorized under 38 U.S.C. 1114(t) shall be paid in lieu of any allowance authorized by 38 U.S.C. 1114(r)(1).

(Authority: 38 U.S.C. 501, 38 U.S.C. 1114(t))

3. Amend § 3.352 by:

a. Redesignating paragraphs (b)(2) through (b)(5) as (b)(3) through (b)(6);

b. In paragraph (b)(1)(iii), removing the phrase “paragraph (b)(2)” and in its place adding the phrase “paragraph (b)(3)”;

c. Adding new paragraph (b)(2);

d. In redesignated paragraph (b)(4), removing the phrase “paragraph (b)(2)” and in its place adding the phrase “paragraph (b)(3)”;

e. In the authority citation at the end of paragraph (b), adding “1114(t)”.

The addition and revision reads as follows:

§ 3.352 Criteria for determining need for aid and attendance and "permanently bedridden."

* * * * *

(b)(1) * * *

(2) A veteran is entitled to the higher level aid and attendance allowance authorized by § 3.350(j) in lieu of the regular aid and attendance allowance when all of the following conditions are met:

(i) As a result of service-connected residuals of traumatic brain injury, the veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section.

(ii) As a result of service-connected residuals of traumatic brain injury, the veteran needs a “higher level of care” (as defined in paragraph (b)(3) of this section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care.

* * *

(Authority: 38 U.S.C. 501, 1114(r)(2), 1114(t))

* * * * *

4. Amend § 3.552(b) by:

- a. In paragraph (b)(2), adding the phrase “or 38 U.S.C. 1114(t)” after the phrase “authorized by 38 U.S.C. 1114(r)(1) or (2)”; and
- b. At the end of paragraph (b), revising the authority citation.

The revision read as follows:

§ 3.552 Adjustment of allowance for aid and attendance.

* * * * *

(Authority: 38 U.S.C. 5503(c))

* * * * *

[FR Doc. 2016-30509 Filed: 12/20/2016 8:45 am; Publication Date: 12/21/2016]