



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 21

RIN 2900–AQ11

VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title - Revision

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) published a final rule in the Federal Register on May 2, 2016, which amended a number of regulations in the Code of Federal Regulations (CFR) to authorize personnel hired by VA’s Vocational Rehabilitation and Employment (VR&E) Service under the title “Vocational Rehabilitation Counselor” (VRC) to make the same determinations with respect to Chapter 31 services and benefits as personnel who had been hired under the title “Counseling Psychologist” (CP). The preamble to that final rule cited supporting documents inaccurately and failed to properly explain the qualifications for and duties of this VR&E position responsible for making determinations with respect to Chapter 31 services and benefits. This interim final rule corrects those inaccuracies, more clearly explains the basis for the final rule, and invites public comment on the changes made to VA’s regulations in the May 2, 2016, final rule.

DATES: Effective Date: This interim final rule is effective [Insert date of publication in the FEDERAL REGISTER]. VA must receive comments on or before [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Submit written comments through <http://www.Regulations.gov>; by mail or hand-delivery to: Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free telephone number.) Comments should indicate that they pertain to “RIN 2900-AQ11, VA Vocational Rehabilitation and Employment Nomenclature Change for Position Title - Revision.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, 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: C.J. Riley, Senior Policy Analyst, Vocational Rehabilitation and Employment Service (28), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW,

Washington, DC 20420, Christi.Hellard@va.gov, (202) 461-9600. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

In a final rule published in the Federal Register on May 2, 2016, at 81 FR 26130, VA amended a number of regulations in Part 21, CFR, to add the title “VRC” for the position responsible for making certain determinations with respect to Chapter 31 services and benefits. In the preamble to the final rule, we stated that the revisions were non-substantive and intended to reflect the fact that the CP and VRC position titles are synonymous because the positions have the same job duties and qualifications. We also stated that the final rule was necessary to ensure consistency. The preamble referenced a performance plan that was purportedly implemented on December 16, 2003, that described how the job duties of and qualifications for a CP and VRC were the same. However, the performance plan was implemented on July 1, 2004, rather than on December 16, 2003, and does not provide that the two positions have the same qualifications. Nonetheless, VRCs are fully qualified to perform the duties specified in Chapter 31 regulations. Therefore, because reversing the changes published in the Federal Register on May 2, 2016, would be harmful to Veterans seeking vocational rehabilitation services for reasons discussed below, we are not reversing those changes at this time. However, VA is seeking public comment on those changes, as further explained in this document. The

explanation that follows corrects the inaccuracies in the preamble to the final rule and more clearly explains the basis for the rule.

VA's VR&E program serves an important function: to assist Veterans who have service-connected disabilities and barriers to employment in obtaining and maintaining suitable employment and achieving maximum independence in daily living. In 1996, VA began to allow use of Office of Personnel Management (OPM) classification series GS-0101, Social Science, to hire personnel under the title "VRC" to provide rehabilitation services. Such services include, but are not limited to, deciding eligibility and entitlement, developing rehabilitation plans, and delivering case management services. VA's VR&E program had previously hired personnel under the title "CP," OPM classification series GS-0180, Psychology, to provide these types of rehabilitation services. Since 1996, after use of the GS-0101 series was allowed, the VR&E program had hired personnel under either series to provide the same types of rehabilitation services and perform the same work. In 2015, VA's Office of Human Resources and Administration concluded that use of the GS-0180 series was not as appropriate as use of the GS-0101 series for personnel whom VA hires to provide rehabilitation services, because the majority of the duties these VR&E personnel perform most closely meets the standards associated with the GS-0101 series. Accordingly, VA discontinued use of the GS-0180 series for these VR&E positions. Although the VR&E program began to fill vacant positions using the GS-0101 series under the "VRC" title, the personnel who had been hired using GS-0180 series under the

“CP” title kept their title and continued to perform under their existing position descriptions.

VR&E Service had updated a few, but not all, regulations governing the delivery of Chapter 31 services and benefits to reflect the hiring of personnel under the title “VRC” for the position responsible for making certain determinations. Specifically, on April 11, 1997 (62 FR 17706), VA issued a final rule defining VRC in 38 CFR 21.35. On March 26, 2007 (72 FR 14041), VA issued a final rule revising 38 CFR 21.50, 21.51, and 21.52 to describe determinations that a VRC may make during an initial evaluation, including the existence of an employment handicap and a serious employment handicap. On January 20, 2010 (75 FR 3165), VA issued a final rule revising 38 CFR 21.42, 21.44, and 21.45 to specify determinations that a VRC may make regarding a claimant’s eligibility period to receive Chapter 31 services.

In September 2014, a Veteran advocate contacted VR&E Service and indicated that he believed that VA had erroneously denied benefits because VA improperly interpreted regulations regarding the roles of CPs and VRCs when making specific determinations. Additionally, the Board of Veterans’ Appeals has remanded cases to regional offices with instructions for a CP to make determinations that a VRC already made, noting that regulations require CPs to make these determinations. Because the VR&E program stopped hiring under the “CP” title, the VR&E program’s national workforce does not have enough CPs to comply with these instructions. Thus, on May 2, 2016, we amended the remainder of our regulations regarding the roles of CPs and VRCs to ensure

consistency with respect to position titles and to clarify that VRCs are authorized to make the same determinations as CPs with regard to Chapter 31 services and benefits.

The shift towards staffing the VR&E positions responsible for making certain determinations with respect to Chapter 31 services and benefits under the VRC title rather than under the CP title reflects a more appropriate classification based on OPM standards and the type of work performed. This shift does not reflect a material change in the duties of or qualifications for the position. Regardless of the classification, VRCs perform the same duties as CPs perform in the VR&E program, and VRCs are fully qualified to perform these duties.

Section 3118(c) of title 38, United States Code, requires VA to establish the necessary and appropriate qualifications for personnel providing evaluation and rehabilitation services under Chapter 31, and to take into account the qualifications established for comparable personnel under the Rehabilitation Act of 1973 (29 U.S.C. Chapter 16). Under this Act, comparable personnel are required to have a baccalaureate degree in a field of study reasonably related to vocational rehabilitation and at least one year of experience working with individuals with disabilities, providing direct service or advocacy, or having direct experience as an employer. In lieu of the experience, personnel may obtain a master's or doctoral degree in a field of study such as vocational rehabilitation counseling, law, social work, psychology, disability studies, or special education. See 29 U.S.C. 721(a)(7)(B)(ii).

VA implemented section 3118(c) by prescribing the qualifications for VRCs in VA's Staffing Handbook (VA Handbook 5005/6, Part II, Appendix F2 (June 3, 2004)). The VR&E program requires all personnel hired as VRCs to hold a master's degree in rehabilitation counseling, including an internship, or in counseling psychology, or a related field, including at least 30 semester hours of course work in the foundations of rehabilitation counseling, human growth and development, counseling theories and techniques, vocational assessment, career development, job placement, case management, or medical/psycho-social aspects of disability. In addition, total graduate study must have included or been supplemented by a supervised internship or successful professional experience following the completion of the master's degree. These requirements are comparable to the requirements applicable to CP positions but are more accurately aligned with the needs of the VR&E program, which is focused on helping Veterans obtain and maintain suitable employment. See the OPM website describing general qualifications for CP classification, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/0100/psychology-series-0180/> (last visited August 10, 2017). Requiring VRCs to have these qualifications puts them in a similar position to CPs, who are required to have comparable qualifications. With comparable qualifications and experience in the closely related fields of counseling psychology and/or rehabilitation counseling, both VRCs and CPs have the same skills and capabilities necessary to perform the duties required for this program, such as counseling, rehabilitation, and employment assistance.

Additionally, as indicated in the most recent VRC position description released with VR&E Letter 28-14-13 on February 20, 2014, VRCs must possess knowledge of psychological, rehabilitation, and counseling theory and principle, as well as special knowledge of rehabilitation counseling skills, techniques, and resources needed to work with Veterans with multiple serious disabilities, Veterans who are largely confined to their homes due to disabilities, Veterans who have serious mental disabilities, and Veterans who have problems adjusting to social and occupational demands. VRCs must also have knowledge of the principles and procedures of psychological and vocational testing and research statistics used to assess a Veteran's interests, aptitudes, abilities, and personality characteristics. In addition, VRCs must know the requirements for independent living, and understand the limitations of, and services required by, individuals with severe disabilities. Finally, VRCs must know career development theory and job placement, and understand current labor market conditions and occupational trends and how to improve employability using the information obtained from transferable work-skills analyses.

Staffing the program with VRCs is a valid programmatic choice because, equipped with such knowledge, VRCs can capably and competently perform the required counseling, rehabilitation, and employment assistance tasks. For example, VRCs have knowledge of psychological, rehabilitation, and counseling theory and principle, and possess rehabilitation counseling skills and techniques to work with emotionally and physically-disabled individuals and prepare them for suitable employment. They understand the requirements for independent living

and the services individuals with severe disabilities require, and they possess the skills and qualifications to effectively perform initial evaluations and make accurate eligibility determinations. Additionally, they know the principles and procedures of psychological and vocational testing and research statistics to competently assess a Veteran's interests, aptitudes, abilities, and personality characteristics to provide the most appropriate rehabilitation planning services. Finally, they have a comprehensive understanding of current labor market conditions and occupational trends to identify the appropriate employment options for each individual they counsel. Requiring VRCs to have such knowledge ensures that VRCs have the capability to assist Veterans with service-connected disabilities in achieving maximum independence in daily living and obtaining and maintaining suitable employment.

Because VRCs are fully qualified to perform the duties of this VR&E position, and because the VR&E program's national workforce does not have enough CPs to fulfill all the required duties of this position, we amended our regulations to authorize VRCs to make the same determinations as CPs with regard to Chapter 31 services and benefits. Accordingly, we adopt, without change, the rule published in the Federal Register on May 2, 2016.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary finds that there is good cause to dispense with the opportunity for prior notice and comment and good cause to publish this rule with an immediate effective date.

The Secretary finds that it is impracticable and contrary to the public interest to delay this rule for the purpose of soliciting prior public comment or to have a delayed effective date, or to reverse the changes made on May 2, 2016, while public comment is being received. The Secretary is issuing this rule to clear up confusion among Veterans and prevent a detrimental impact with regard to the VR&E program. Failure to incorporate the VRC position title in VR&E regulations would result ultimately in a long delay in the processing of Veterans' cases and the provision of VR&E services and assistance.

The VR&E program no longer hires employees under the CP title. This is the unavoidable result of the conclusion that the GS-0101 classification series is more appropriate than the GS-0180 classification series. Accordingly, the overwhelming majority of the VR&E program's national workforce providing vocational rehabilitation and employment services are VRCs, with only 10 CPs remaining in the VR&E workforce. Therefore, the program does not have enough CPs to meet workload demands. If we did not maintain the May 2, 2016, changes to our regulations while public comment is being received, and CPs were required to make decisions in every VR&E case as part of the rehabilitation process, many decisions would be delayed and processing Veteran cases would be greatly impacted. As a result, there would be a significant delay in Veterans receiving the VR&E services and assistance to which they are entitled.

The VR&E program provided evaluation and counseling services to 173,599 Veterans in 2016. Although some regulations had already been updated to allow VRCs to perform some VR&E program duties, the regulations

governing the majority of evaluation, counseling, and case management services were updated to allow VRCs to provide these services in the May 2, 2016, rulemaking. If we did not maintain the May 2, 2016, changes to our regulations, most of the 173,599 Veterans the VR&E program serves annually would not receive evaluation, counseling, and case management services in a timely manner because the 10 CPs the VR&E program employs could not possibly provide these services to so many Veterans. It would not be in the best interest of veterans to limit hundreds of VRCs to highly circumscribed duties while thousands of Veterans seeking employment services from VA wait for service from the 10 CPs VA still has in its workforce.

Additionally, the rule clears up confusion among VR&E program participants regarding the two positions titles, VRC and CP, and the respective roles of the two positions within the VR&E program. Because of this confusion, it was necessary to update the VR&E regulations to specify that these two positions are both authorized to perform the same duties.

Because this interim final rule will serve to clarify roles with regard to two position titles used within the VR&E program, and alleviate confusion related to the titles, and because it will serve to prevent delay in Veterans receiving the VR&E services and assistance to which they are entitled, the Secretary finds that it is impracticable and contrary to the public interest to delay this rule for the purpose of soliciting advance public comment or to have a delayed effective date. Accordingly, VA is issuing this rule as an interim final rule with an immediate effective date. We will consider and address any comments received

within 60 days of the date this interim final rule is published in the Federal Register.

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 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.”

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined they are not significant 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 Fiscal Year To Date."

Paperwork Reduction Act

This rule contains no collections of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this interim 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 rule will not directly affect any small entities; only individuals will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.116, Vocational Rehabilitation for Disabled 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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on October 23, 2017 for publication.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant

programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

November 14, 2017

Michael Shores
Director, Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

For the reasons set out in the preamble, the regulatory amendments in the final rule published in the Federal Register on May 2, 2016, at 81 FR 26130, and incorporated in the CFR are affirmed. Only the preamble originally published on May 2, 2016, at 81 FR 26130, is hereby replaced.

[FR Doc. 2017-24949 Filed: 11/16/2017 8:45 am; Publication Date: 11/17/2017]