



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: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its adjudication regulations to add an additional compensation benefit for veterans with residuals of traumatic brain injury (TBI). This final rule incorporates in regulations a benefit authorized by the enactment of the Veterans' Benefits Act of 2010. The Veterans' Benefits Act authorizes special monthly compensation (SMC) 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.

DATES: Effective Date: This final rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

Applicability Date: The provisions of this final rule shall apply to all applications for benefits received by VA on or after October 1, 2011, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on October 1, 2011.

FOR FURTHER INFORMATION CONTACT: Roselyn Tyson, 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 December 21, 2016, VA published in the Federal Register (81 FR 93649) a proposed rule to amend 38 CFR 3.350 and 3.352 to add SMC for veterans with residuals of TBI. As explained in the proposed rule, section 601 of the Veterans' Benefits Act of 2010, Public Law 111-275 (the Veterans' Benefits Act) authorized SMC for veterans who, as the result of service-connected disability, are in need of regular aid and attendance for the residuals of TBI, and in the absence of such regular aid and attendance, would require hospitalization, nursing home care, or other residential institutional care. Effective October 1, 2011, section 601 authorized 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).

To date, VA has relied on non-regulatory guidance to implement section 601 of the Veterans' Benefits Act. By issuing this final rule, VA updates its adjudication regulations to reflect the authorization provided by section 601.

Response to Public Comments

As noted above, VA published the proposed rule in the Federal Register (81 FR 93649) on December 21, 2016. VA provided a 60-day public comment period, which ended on February 21, 2017, and received two comments. VA responds to all comments as follows. For the reasons set forth in the proposed rule and below, VA adopts the proposed rule as final, without changes.

Both commenters expressed support for the rulemaking, noting that SMC should be awarded for TBI. VA appreciates the time and effort expended by these commenters in reviewing the proposed rule and in submitting comments, as well as their support for this rulemaking.

One commenter stated that this rulemaking should restrict the use of SMC payments to treatment for TBI. The commenter noted that application for SMC funds should be made on a yearly basis and the funds should be applied specifically for medical care of the TBI. VA notes that it has no authority to direct how payments are used once awarded to a veteran; VA only has legal authority to determine benefit eligibility and entitlement.

The same commenter stated that application of SMC should be limited to claims where TBI that was incurred in the line of duty and was not a result of self-inflicted injury, and the veteran applying for the benefit was not dishonorably discharged. This commenter also appears to suggest that posttraumatic stress disorder (PTSD) be included in the definition of a TBI and provided examples of individuals who may have benefited from this approach.

While any injury outside the line of duty would not be service connected, we note that the occurrence of such an injury is interpreted very broadly. See

Holton v. Shinseki, 557 F.3d 1362, 1366-67 (Fed. Cir. 2009) (explaining that an injury or disease will be deemed to have been incurred in the line of duty if it occurred at almost any time during a veteran’s active service—even during authorized leave). With regard to the commenter’s statement that self-inflicted injuries should not be the basis for service-connected TBI for SMC, we note that self-inflicted injuries generally would not be covered to the extent they constituted willful misconduct. Whether or not a given self-injury rises to the level of willful misconduct is a case specific factual determination that is separate from the level of compensation at stake, which is what is affected by this rule. See 38 CFR 3.301. While the commenter also expressed that SMC based on service-connected TBI should not be available to individuals with a dishonorable discharge, VA statutes and regulations preclude veteran status and benefits for individuals with a dishonorable discharge. 38 U.S.C. 101(2); 38 CFR 3.12(a). Finally, in response to the commenter’s last assertion that VA should define whether PTSD “is included under the definition of [TBI],” we note that PTSD is already a disability available for VA service connection and rating as a mental disorder under 38 CFR 4.130, Diagnostic Code 9411. Therefore, VA already compensates veterans for service-connected PTSD, including with PTSD that is somehow causally related to TBI.

In any case, the general eligibility criteria for SMC and the definition of TBI are outside the scope of this rulemaking. Therefore, VA makes no change based on these comments.

The second commenter stated that veterans with TBI should have always qualified for maximum monthly relief. VA notes that SMC is authorized by statute, and prior to the enactment of the Veterans' Benefits Act, VA lacked the statutory authority to provide the level of SMC contemplated in the Act for TBI. The commenter also noted the length of time it took to authorize and implement SMC for TBI. As noted above, VA has to date relied on non-regulatory guidance to implement the statutory authorization for SMC for TBI. Finally, the commenter stated that VA should provide coverage to veterans for all injuries, not just TBI. As noted above, the requirements for service connection, including for disabilities other than TBI, are beyond the scope of this rulemaking. Therefore, VA makes no change based on this comment.

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 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.” This final rule is not an EO 13771 regulatory action because this final rule is not significant under EO 12866.

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

Paperwork Reduction Act

Although this document contains provisions constituting a collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), no new or proposed revised collections of information are associated with this final rule. The information collection requirements are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900-0721. Since this collection was revised several years after the implementation of the Veterans' Benefit Act of 2010 and VBA's interim guidance, VA concludes that any new respondents have

been captured in the existing respondent numbers. See Regulatory Impact Analysis for a full explanation.

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. Jacquelyn Hayes-Byrd, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on May 2, 2018, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: May 2, 2018.

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Impact Analyst,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble to this final rule, VA amends 38 CFR part 3 as follows:

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 by adding paragraph (j) and a parenthetical authority citation 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. In paragraph (b)(1)(iii), removing the phrase “paragraph (b)(2)” and in its place adding the phrase “paragraph (b)(3)”;

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

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

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

e. Removing the parenthetical authority citation at the end of paragraph (b); and

f. Adding a parenthetical authority citation at the end of the section.

The additions read as follows:

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

* * * * *

(b) * * *

(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 by:

a. In paragraph (b)(2), removing “38 U.S.C. 1114(r) (1) or (2)” and adding in its place “38 U.S.C. 1114(r)(1) or (2) or 38 U.S.C. 1114(t)”;

b. Removing the parenthetical authority citation at the end of paragraph (b); and

c. Adding a parenthetical authority citation at the end of the section.

The addition reads as follows:

§ 3.552 Adjustment of allowance for aid and attendance.

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

[FR Doc. 2018-09736 Filed: 5/7/2018 8:45 am; Publication Date: 5/8/2018]