



38 CFR Parts 3 and 36

RIN 2900-AR26

Assistance to Eligible Individuals in Acquiring Specially Adapted Housing

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication and loan guaranty regulations regarding eligibility and assistance for certain veterans and members of the Armed Forces in acquiring specially adapted housing assistance. The amendments are necessary to implement certain provisions of the Ryan Kules and Paul Benne Specially Adaptive Housing Improvement Act of 2019.

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

Applicability dates: The amendments to 38 CFR 3.809, 3.809a, and 36.4404 shall apply to all applications for benefits that were or are received by VA on or after August 8, 2020, or that were pending before VA (including the Board of Veterans' Appeals), the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on August 8, 2020.

The amendments to 38 CFR 36.4402, 36.4403, and 36.4406 shall apply to all applications for benefits that were or are received by VA on or after October 1, 2020, or that were pending before VA (including the Board of Veterans' Appeals), the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Terry Rouch, Assistant Director for Loan Policy and Valuation, Loan Guaranty (26), Veterans Benefits Administration,

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SUPPLEMENTARY INFORMATION: The President signed into law the Ryan Kules and Paul Benne Specially Adaptive Housing Improvement Act of 2019 (the Act), Pub. L. 116-154, 134 Stat. 690, on August 8, 2020. The Act amended certain provisions of 38 U.S.C. chapter 21, *Specially Adapted Housing for Disabled Veterans*.

Chapter 21 authorizes VA to provide specially adapted housing (SAH) assistance to eligible individuals with certain service-connected disabilities. Eligible individuals can include veterans and members of the Armed Forces. 38 U.S.C. 2101A. SAH assistance can be used toward the purchase, construction, or adaptation of a home that suits the individual's living needs. 38 U.S.C. 2102. It can also be used to reduce the debt associated with the costs of acquiring a home that is already adapted. Id. The amount of SAH assistance available to an eligible individual varies depending on factors such as the nature of the individual's disability, the scope of the eligible individual's project, and the amounts of SAH assistance the eligible individual has already received.

I. Amendments under Section 2 of the Act

Section 2 of the Act, which became effective upon enactment, amended 38 U.S.C. 2101(a) and (b) to change SAH eligibility for individuals with blindness in both eyes. Previously, the Secretary could provide such an individual with assistance under section 2101(a) if the individual had a permanent and total service-connected disability due to blindness in both eyes having only light perception, plus loss or loss of use of one lower extremity. Alternatively, the Secretary could provide a lesser amount of assistance under section 2101(b) if the individual had a service-connected disability due to blindness in both eyes with a central visual acuity of 20/200 or less in the better eye with the use of a standard correcting lens. For the purposes of that clause, the

Secretary was to have considered an eye with a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees as having a central visual acuity of 20/200 or less.

With the enactment of the Act, the loss or loss of use of one lower extremity is no longer an eligibility criterion under section 2101(a) for individuals with blindness in both eyes. Further, the criterion that the service-connected disability for blindness be “permanent and total” has been changed to “permanent”. Eligibility for blindness in both eyes under section 2101(a) is no longer described as having only light perception, but is instead described as it had been under the eligibility criteria found in section 2101(b): having central visual acuity of 20/200 or less in the better eye with the use of a standard correcting lens. For the purposes of this clause, an eye with a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less. In effect, an individual who was eligible for SAH assistance under prior section 2101(b)(2)(A) is now eligible to receive SAH assistance under section 2101(a)(2)(B)(ii) instead and can receive up to \$100,896 for fiscal year 2021. See 85 FR 71139. The Act removed eligibility for SAH assistance under section 2101(b) for service-connected disability due to blindness in both eyes.

Accordingly, VA is amending its adjudication regulations found at 38 CFR 3.809 and 3.809a and its loan guaranty regulations found at 38 CFR 36.4404 to reflect the changes in section 2101(a) and (b). Such amendments align the regulations with current section 2101(a) and (b). VA has also added applicability date language to clarify that these changes, which mirror the statutory changes, shall apply to all applications for benefits that were or are received by VA on or after August 8, 2020, or that were pending before VA (including the Board of Veterans' Appeals), the United States Court

of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on August 8, 2020. This date reflects the Act's enactment date.

II. Amendments under Section 3 of the Act

Prior to enactment of the Act, under 38 U.S.C. 2102, an eligible individual was allowed three separate grants of assistance under 38 U.S.C. chapter 21. Section 3(a) of the Act amended section 2102(d)(3) to allow a maximum of six grants of assistance. The amendment was effective October 1, 2020. To comply with this change to section 2102(d), VA is amending 38 CFR 36.4402(d)(2), 36.4403, and 36.4406(a)(2). VA is also clarifying that these changes, which mirror the statutory changes, shall apply to all applications for benefits that were or are received by VA on or after October 1, 2020, or that were pending before VA (including the Board of Veterans' Appeals), the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on October 1, 2020. This date reflects the effective date provided in section 3(f) of the Act.

III. SAH-related provisions of the Act not covered by this rulemaking

Section 3(b) of the Act amended section 2101(a) by increasing from 30 to 120 the number of SAH applications VA can approve annually for post-9/11 veterans described in 38 U.S.C. 2101(a)(2)(A)(ii). These are veterans who served in the Armed Forces on or after September 11, 2001, and are entitled to VA disability compensation for a permanent service-connected disability. For eligibility, the disability had to be incurred on or after September 11, 2001, and must be due to the loss or loss of use of one or more lower extremities which so affects the function of balance or propulsion as to preclude ambulating without the aid of braces, crutches, canes, or a wheelchair. See 38 U.S.C. 2101(a)(2)(A)(ii) and 2101(a)(2)(C). The amendment was effective October 1,

2020. Pub. L. 116-154, sec. 3(f). VA will, in a future rulemaking, promulgate regulatory changes regarding veterans described in section 2101(a)(2)(A)(ii).

Section 3(c) through (e) increased the statutory aggregate dollar limits authorized for section 2101(a) and 2101(b) grants to \$98,492 and \$19,733, respectively, effective October 1, 2020. Those amounts were increased for fiscal year 2021, based on an annual adjustment required under 38 U.S.C. 2102(e). See 85 FR 71139 (increasing section 2101(a) and 2101(b) grants to \$100,896 and \$20,215, respectively). The amounts were also increased for fiscal year 2022, effective October 1, 2021 (section 2101(a) and 2101(b) grants increased to \$101,754 and \$20,387, respectively). 38 U.S.C. 2102(e). VA intends to publish a separate notice in the *Federal Register* announcing the adjustment for fiscal year 2022.

Finally, section 4 of the Act added a new section 2102(f) that authorizes VA, beginning October 1, 2030, to provide an additional amount of SAH assistance under sections 2101(a) or (b) in an amount that does not exceed half of the aggregate dollar limit for the applicable section, as adjusted for the year in which VA provides the additional assistance. New section 2102(f)(1) limits the assistance to “covered veterans” who meet three criteria prescribed in a new 38 U.S.C. 2102(f)(2). To meet these criteria, the covered veteran must be eligible for SAH assistance under section 2101(a)(2) or 2101(b)(2). See 38 U.S.C. 2102(f)(2)(A). At least ten years must have elapsed between the date of his or her application for additional assistance and his or her last use of chapter 21 assistance. See 38 U.S.C. 2102(f)(2)(B). He or she must live in a home that VA determines does not have adaptations that are reasonably necessary because of his or her disability. See 38 U.S.C. 2102(f)(2)(C). VA notes that section 3 of the Act amended section 2102(d)(3) such that the newly enacted six-use limitation (described above) is subject to the new section 2102(f). In other words, a covered Veteran may

receive the newly authorized assistance provided under section 2102(f) even if he or she has already obtained the six grants of SAH assistance otherwise authorized.

As mentioned above, assistance under subsection (f) cannot be provided before October 1, 2030. VA intends to promulgate regulations implementing subsection (f), including any amendments that would implement the relevant cross-referencing clause of section 2102(d)(3), in a separate rulemaking.

Administrative Procedure Act

VA finds good cause under the provisions of 5 U.S.C. 553(b)(B) to publish this rule without prior opportunity for public comment. This amendment merely revises VA's regulations to mirror the statutory changes to the criteria and assistance provided to certain veterans and members of the Armed Forces through the SAH program. These revisions reflect statutory changes VA is adopting directly, without change, into VA's regulations and do not the exercise of any discretion by VA. Therefore, prior notice and opportunity for public comment is unnecessary.

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. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action

under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that his 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 is adopting changes in law that will directly affect only individuals by assisting such individuals in acquiring specially adapted housing grants and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

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.

Paperwork Reduction Act

This action contains provisions constituting collections of information at 38 CFR 36.4403, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521). The information collection requirements for § 36.4403 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900-0132. Although no new collections of information are associated with this

final rule, there will be an increase in the number of respondents associated with the already approved OMB control number. This rule will result in an increase of 111 estimated annual burden hours and an annual cost of \$3,004.¹ As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit this information collection amendment to OMB for its review.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this final rule are 64.106, Specially Adapted Housing For Disabled Veterans; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.118, Veterans Housing Direct Loans for Certain Disabled Veterans.

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).

¹ VA estimates an additional 670 applications will be completed annually as a result of the provisions codified in this final rule. The incremental costs of this rule were calculated using an estimated time burden of 10 minutes to complete the information collection under 38 CFR 36.4403 (also known as VA Form 26-4555). Because VA cannot make further assumptions about the population of respondents (veterans with service-connected disabilities) because of the variability of factors such as the educational background and wage potential of respondents, VA used general wage data to estimate the respondents' costs associated with completing the information collection. The Bureau of Labor Statistics (BLS) gathers information on full-time wage and salary workers. According to the latest available BLS data (May 2020), the mean hourly wage is \$27.07 based on the BLS wage code – "00-0000 All Occupations". This information is taken from the following website: (https://www.bls.gov/oes/current/oes_nat.htm#00-0000).

List of Subjects

38 CFR Part 3

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

38 CFR Part 36

Condominiums, Housing, Individuals with disabilities, Loan programs-housing and community development, Loan programs-Indians, Loan programs-veterans, Manufactured homes, Mortgage insurance, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 14, 2021, 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.

Jeffrey M. Martin,

Assistant Director,

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 amends 38 CFR parts 3 and 36 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 § 3.809 by revising paragraphs (a) and (b) to read as follows:

§ 3.809 Specially adapted housing under 38 U.S.C. 2101(a)(2)(A)(i).

* * * * *

(a) *General.* A member of the Armed Forces serving on active duty must have a disability that was incurred or aggravated in line of duty in active military, naval, or air service and meets the requirements described in paragraph (b) of this section. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a service-connected disability that meets the requirements described in paragraph (b) of this section.

(b) *Disability.* The disability must be rated as one of the following:

(1) A permanent and total disability due to the loss or loss of use of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.

(2) A permanent disability due to blindness in both eyes, having central visual acuity of 20/200 or less in the better eye with the use of a standard correcting lens. For the purposes of this paragraph (b)(2), an eye with a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less.

(3) A permanent and total disability due to the loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.

(4) A permanent and total disability due to the loss or loss of use of one lower extremity together with the loss or loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.

(5) A permanent and total disability due to the loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow.

(6) A permanent and total disability due to full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

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3. Amend § 3.809a by:

- a. Removing paragraph (b)(2);
- b. Redesignating paragraphs (b)(1) introductory text and (b)(1)(i), (ii), (iii), and (iv) as paragraphs (c) introductory text and (c)(1), (2), (3), and (4), respectively; and
- c. Revising newly redesignated paragraph (b).

The revisions read as follows:

§ 3.809a Special home adaptation grants under 38 U.S.C 2101(b).

* * * * *

(b) A member of the Armed Forces serving on active duty must have a disability that was incurred or aggravated in line of duty in active military, naval, or air service and meets the requirements described in paragraph (c) of this section. A veteran must be

entitled to compensation under chapter 11 of title 38, United States Code, for a disability that meets the requirements described in paragraph (c) of this section.

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PART 36 – LOAN GUARANTY

4. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

§ 36.4402 [Amended]

5. Amend § 36.4402 by removing in the last sentence of paragraph (d)(2) the word “three” and adding in its place “six”.

§ 36.4403 [Amended]

6. Amend § 36.4403 by removing the word “three” everywhere it appears and adding in its place “six”.

7. Amend § 36.4404 by:

- a. Revising paragraphs (a)(1) introductory text, (a)(1)(i) and (ii), (a)(1)(iii) introductory text, and (a)(1)(iv) and (v);
- b. Removing paragraph (a)(2)(i);
- c. Redesignating paragraphs (a)(2)(ii) and (iii) as paragraphs (a)(2)(i) and (ii), respectively; and
- d. Revising newly redesignated paragraph (a)(2)(ii).

The revisions read as follows:

§ 36.4404 Eligibility for assistance.

(a) * * *

(1) The 2101(a) grant is available to individuals with a service-connected disability who have been rated as being entitled to compensation under 38 U.S.C. chapter 11 for any of the following conditions:

(i) A permanent and total disability due to the loss, or loss of use, of both lower extremities so as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

(ii) A permanent disability due to blindness in both eyes having central visual acuity of 20/200 or less in the better eye with the use of a standard correcting lens. For the purposes of this paragraph (a)(1)(ii), an eye with a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less;

(iii) A permanent and total disability due to the loss or loss of use of one lower extremity, together with—

* * * * *

(iv) A permanent and total disability due to the loss, or loss of use, of both upper extremities so as to preclude use of the arms at or above the elbows; or

(v) Any other permanent and total disability identified as eligible for assistance under 38 U.S.C. 2101(a).

(2) * * *

(ii) Any other injury identified as eligible for assistance under 38 U.S.C. 2101(b).

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§ 36.4406 [Amended]

8. Amend § 36.4406 by removing the word “three” in the last sentence of paragraph (a)(2) and adding in its place “six”.