



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 45

[Docket ID: DOD-2023-OS-0065]

RIN 0790-AL70

Medical Malpractice Claims by Members of the Uniformed Services

AGENCY: Department of Defense Office of General Counsel, DoD.

ACTION: Proposed rule with request for comments.

SUMMARY: The Department of Defense (DoD) proposes to amend the regulations governing medical malpractice claims by members of the uniformed services to adjust and update certain portions of the regulation related to calculation of damages. Currently, total potential damages are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or the Department of Veterans Affairs (VA) for the same harm that is the subject of the medical malpractice claim. The amendments would apply offsets to economic damages only. The amendments would also clarify when future lost wages may be awarded.

DATES: Comments will be accepted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The changes in the proposed rule would apply to claims received by DoD on or after the date the final rule is published in the *Federal Register* and to claims pending before DoD on that date.

ADDRESSES: You may submit comments, identified by docket number and/or regulatory identifier number (RIN) and title, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

• Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this *Federal Register* document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Melissa D. Walters, (703) 681-6027.

SUPPLEMENTARY INFORMATION:

I. Background

Section 2733a of title 10, United States Code, allows members of the uniformed services or their authorized representatives to file claims, and the Secretary of Defense to pay such claims, for personal injury or death caused by a DoD health care provider in a covered military medical treatment facility, as defined in that section. DoD published an interim final rule to establish uniform standards and procedures for adjudicating these claims on June 17, 2021 (86 FR 32194) and a final rule on August 26, 2022 (87 FR 52446).

II. Explanation of Changes With This Rule

The proposed amendments to 32 CFR 45.11 would apply offsets for payments made by the U.S. Government to economic damages only. Under the current version of 32 CFR 45.11, total potential damages are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim.

The amendments would also clarify that future lost wages may be awarded: (1) until the time DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment; (2) in cases of permanent incapacitation, until expiration of the

claimant's work-life expectancy; or (3) in cases of death, until the expiration of the claimant's work-life expectancy, after deducting for the claimant's personal consumption.

III. Section-by-Section Discussion

The following is a section-by-section overview of the amendments in this rulemaking.

Section 45.1—Purpose of this part. Proposed § 45.1(b) eliminates a reference to the total value of compensation the claimant is expected to receive under a comprehensive system of compensation for death or disability being subject to offset. Instead, it generally refers to § 45.11, which relates to offsets.

Section 45.9—Calculation of damages: economic damages. Proposed § 45.9(b)(4) changes “loss of earning capacity” to “future lost earnings” to parallel “past lost earnings” in § 45.9(b)(3). Proposed § 45.9(b)(4) includes a change to account for future lost earnings until the time DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment or, in cases of permanent incapacitation, until expiration of the claimant's work-life expectancy. Future lost earnings must be substantiated by appropriate documentation and claimants have an obligation to mitigate damages.

Proposed § 45.9(d) is added to indicate that an injury or condition does not result in lost earnings for purposes of this regulation if the lost earnings are the result of disability discrimination. Lost earnings stemming from disability discrimination may be settled and paid under other provisions of law and therefore are not compensable under this regulation.

For example, if a claimant suffers severe facial disfigurement as a result of medical malpractice but because a potential employer discriminates against that claimant for fear of negative reactions to the disfigurement, the claimant's redress for the inability to obtain employment would be under provisions of law relating to employment discrimination and not under 10 U.S.C. 2733a.

Section 45.10—Calculation of damages: non-economic damages. Proposed § 45.10(a) includes language currently in § 45.10(b) regarding proof of a claimant's non-economic damages

that DoD may require. This amendment keeps information relating to the proof of non-economic damages together for clarity.

Proposed § 45.10(b) consolidates the description of the elements of non-economic damages into one paragraph. This eliminates confusion that might arise from separating conscious pain and suffering from disfigurement, as a single amount is awarded for all non-economic damages.

Section 45.10(c) removes the amount of the cap on non-economic damages from the regulatory text. This change eliminates the need for publication of conforming administrative amendments to the regulation each time updates to the cap amount are published via *Federal Register* notice.

Section 45.11— Calculation of damages: offsets for DoD and VA Government compensation. In the current version of the regulation, total potential damages calculated under this part, both economic and non-economic, are reduced by offsetting most of the compensation otherwise provided, or expected to be provided, by DoD or VA for the same harm that is the subject of the medical malpractice claim. Under the proposed amendments, offsets are applied to economic damages only.

Proposed § 45.11(a) states that total potential economic damages calculated under this part are reduced by offsetting most of the compensation otherwise provided, or expected to be provided, by DoD or VA for the same harm that is the subject of the medical malpractice claim. This is a change from the current rule, which makes all offsets from the total potential economic and non-economic damages. Compensation received from DoD or VA that does not relate to the malpractice is still excluded from the offset. Under § 45.4(c), claimants have the burden of substantiating their claim by a preponderance of the evidence and, under §§ 45.9(a) and 45.10(a), the burden of proving the amount of damages by a preponderance of the evidence. This change makes it clear that DoD has the burden of establishing the applicability and amount of any offsets from the amount of damages otherwise payable to the claimant.

Proposed § 45.11(c), formerly § 45.11(d) in the current regulation, states that present value is used to calculate offsets against economic damages. This change is necessary with the proposed change to offset economic damages only. An award of future lost earnings and retirement benefits is reduced to present value, so the offsetting compensation for future lost earnings and retirement benefits must also be reduced to present value.

Proposed § 45.11(d) contains the same language as § 45.11(c) in the current regulation, with the addition of language from § 45.11(a) in the current regulation stating that claimants must provide information not available to DoD, but requested by DoD, for the purpose of determining offsets.

Proposed § 45.11(e) combines what is currently in §§ 45.11(e) through (g) in the current regulation. Proposed § 45.11(e) removes the reference to pay and allowances while a member remains on active duty, or in an active status, as an offset because the member receiving these pay and allowances has not lost earnings.

IV. Regulatory Analysis

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distribution of impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been determined to be a significant regulatory action, although not economically significant. Accordingly, it has been reviewed by the Office of Management and Budget as required by these Executive orders.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601 et. seq)

The General Counsel of the Department of Defense certified that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Therefore, the Regulatory Flexibility Act, as amended, does not require a regulatory flexibility analysis.

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require non-Federal spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. This proposed rule does not mandate any requirements for State, local, or tribal governments, nor affect private sector costs.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this proposed rule does not impose new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This proposed rule does not have a substantial effect on State and local governments.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rulemaking will not have a substantial effect on Indian tribal governments.

V. Impact of this Regulation

a. Summary

The proposed amendments adjust and update certain portions of the regulation related to calculation of damages. The amendments would apply offsets to economic damages only. The amendments would also clarify when future lost wages may be awarded.

b. Affected Population

At the end of Fiscal Year 2022, there were approximately 1,410,000 Active Duty Service members, and 440,000 Reserve and National Guard members eligible for DoD healthcare benefits. These uniformed Service members will be able to file claims with DoD alleging malpractice from care at DoD military medical treatment facilities as defined in section 2733a.

c. Costs

DoD does not estimate that any additional claims will be filed as a result of the proposed amendments to the regulation. Since the enactment of section 2733a, individuals who believe they have been subjected to malpractice have filed claims involving injuries ranging from minor injuries to death, regardless of the potential application of offsets.

d. Transfers

Regardless of the number of claims in which malpractice occurred, the only claims in which damages will be awarded are those which exceed the offsets for any payment to be made. The proposed changes solely impact non-economic damages. No changes are proposed that would impact offsets from economic damages.

Based on claims adjudicated under this part in 2021 and 2022, four claims were adjudicated in which offsets were applied. The outcome would have been different in only one of these claims had the proposed amendments been in effect. In that one claim, \$200,000 of the potential non-economic damages was subject to offset. This \$200,000 would not have been offset from non-economic damages under the proposed changes.

Claims in 2021 and 2022 may not necessarily be representative of claims in future years. Claims were accepted beginning January 1, 2020, but could only begin to be adjudicated beginning on July 17, 2021, when the Interim Final Rule became effective. The first claims adjudicated under this new process were claims that did not require a decision on the merits of whether malpractice occurred, such as claims that were denied because the alleged malpractice fell outside the statute of limitations in 10 U.S.C. 2733a(b)(4). Just as with claim resolution processes involving non-Service member claims, more complex claims, which tend to involve higher amounts of damages, require time for review. Since Service members' claims have only been able to be adjudicated since July 17, 2021, more complex claims may still be under adjudication, and the one claim that would have had a different outcome in 2021 and 2022 may not be representative of the number of claims that would be impacted going forward.

Taking the limited information into account, DoD estimates that the changes to the regulation would affect 2 claims per year, instead of basing its estimate on the one historical claim that would have been impacted. The average of the non-economic damages at issue in the four claims in which offsets were applied was \$337,500. Assuming \$337,500 additional would be paid in 2 claims, the estimated total cost to the government therefore would be \$675,000. Of this, the first \$100,000 of each of the two claims would be paid by DoD, with the remainder to be paid by the Treasury.

e. Benefits

The proposed changes to the regulation will allow some Service members to receive compensation for non-economic damages that they would not have been able to receive under the current regulation. The changes afford some Service members additional compensation in light of the non-economic harms they have experienced as a result of malpractice.

List of Subjects in 32 CFR Part 45

Medical, Malpractice, Claims, Uniformed Services.

Accordingly, the Department of Defense proposes to amend 32 CFR part 45 to read as follows:

**PART 45-MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE
UNIFORMED SERVICES**

1. The Authority for part 45 continues to read as follows:

Authority: 10 U.S.C. 2733a.

2. Amend § 45.1 by revising paragraph (b) to read as follows:

§ 45.1 Purpose of this part.

* * * * *

(b) *Relationship to military and veterans' compensation programs.* Federal law provides a comprehensive system of compensation for military members and their families in cases of death or disability incurred in military service. This system applies to all causes of death or disability incurred in service, whether due to combat injuries, training mishaps, motor vehicle accidents, naturally occurring illnesses, or household events, with limited exceptions (*e.g.*, when the member is absent without leave or the injury is due to the member's intentional misconduct or willful negligence). This comprehensive compensation system applies to cases of personal injury or death caused by medical malpractice incurred in service as it does to all other causes. This part provides for the possibility of separate compensation in certain cases of medical malpractice but in no other type of case. A medical malpractice claim under this part will have no effect on any other compensation the member or the member's family is entitled to under the comprehensive compensation system applicable to all members. However, if the U.S. government makes a payment for harm caused by malpractice, this payment reduces the potential damages under this part as provided in § 45.11.

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3. Amend § 45.9 by revising paragraph (b)(4) and adding paragraph (d) to read as follows:

§ 45.9 Calculation of damages: economic damages.

* * * * *

(b) * * *

(4) Future lost earnings:

(i) Until DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment;

(ii) In cases of permanent incapacitation, until expiration of the claimant's work-life expectancy; or

(iii) In cases of death, until the expiration of the claimant's work-life expectancy, after deducting for the claimant's personal consumption.

(iv) Future lost earnings must be substantiated by appropriate documentation and claimants have an obligation to mitigate damages.

(v) In addition, loss of retirement benefits is compensable and similarly discounted after appropriate deductions. Estimates for future lost earnings and retirement benefits must be discounted to present value.

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(d) *Disability discrimination.* An injury or condition does not result in lost earnings for purposes of, and is not compensable under, this regulation if the lost earnings stem from disability discrimination, which may be settled and paid under other provisions of law.

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4. Amend § 45.10 by revising paragraphs (a) through (c) to read as follows:

§ 45.10 Calculation of damages: non-economic damages.

(a) *In general.* Non-economic damages are one component of a potential damages award. The claimant has the burden of proof on the amount of non-economic damages by a preponderance of evidence. DoD may request an interview of or statement from the claimant or other person with primary knowledge of the claimant. DoD may also require medical statements documenting the claimant's condition and, in cases of disfigurement, photographs documenting the claimant's condition.

(b) *Elements of non-economic damages.* Non-economic damages include pain and suffering; physical discomfort; mental and emotional trauma or distress; loss of enjoyment of life; physical disfigurement resulting from an injury to a member that causes diminishment of beauty or symmetry of appearance rendering the member unsightly, misshapen, imperfect, or deformed; and the inability to perform daily activities that one performed prior to injury, such as recreational activities. Such damages are compensable as part of non-economic damages.

(c) *Cap on non-economic damages.* In any claim under this part, total non-economic damages may not exceed a cap amount published by DoD via a *Federal Register* notice. DoD will periodically publish updates to this cap amount via *Federal Register* notices, consistent with changes in prevailing amounts in the majority of the States with non-economic damages caps.

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5. Amend § 45.11 by:

- a. Revising paragraph (a);
- b. Redesignating paragraph (c) and (d) as paragraphs (d) and (c), respectively;
- c. Revising the first sentence in the newly redesignated paragraph (c);
- d. Adding a sentence to the end of the newly redesignated paragraph (d);
- e. Revising paragraph (e); and
- f. Removing paragraphs (f) and (g).

The revisions and additions read as follows:

§ 45.11 Calculation of damages: offsets for DoD and VA Government compensation.

(a) *In general.* Total potential economic damages calculated under this part are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim. DoD has the burden to establish the applicability and amount of any offsets.

* * * * *

(c) *Present value of future payments and benefits.* In determining offsets under this section from economic damages, DoD will use the present value of future payments and benefits.

* * *

(d) *Information considered.* * * * Claimants must provide information not available to DoD, but requested by DoD, for the purpose of determining offsets.

(e) *Benefits and payments that may be considered as potential offsets.* The general rule is that potential damages calculated under this part may be offset only by DoD or VA payments and benefits that are primarily funded by Government appropriations. Potential damages calculated under this part are not offset by U.S. Government payments and benefits that are substantially funded by the military member. The following examples are provided for illustrative purposes only, are not all-inclusive, and are subject to adjustment as appropriate.

(1) The following DoD and VA payments and benefits are primarily funded from Government appropriations and will be offset:

(i) Disability retired pay in the case of retirement due to the disability caused by the alleged medical malpractice.

(ii) Disability severance pay in the case of non-retirement disability separation caused by the alleged medical malpractice.

(iii) Incapacitation pay.

(iv) Involuntary and voluntary separation pays and incentives.

(v) Death gratuity.

(vi) Housing allowance continuation.

(vii) Survivor Benefit Plan.

(viii) VA disability compensation, to include Special Monthly Compensation, attributable to the disability resulting from the malpractice.

(ix) VA Dependency and Indemnity Compensation, attributable to the disability resulting from the malpractice.

(x) Special Survivor Indemnity Allowance.

(xi) Special Compensation for Assistance with Activities of Daily Living.

(xii) Program of Comprehensive Assistance for Family Caregivers.

(xiii) Fry Scholarship.

(xiv) TRICARE coverage, including TRICARE-for-Life, for a disability retiree, family, or survivors. Future TRICARE coverage is part of the Government's compensation package for a disability retiree or survivor.

(2) The following U.S. Government payments and benefits are substantially funded by the military members or are otherwise generally not eligible for consideration as potential offsets:

(i) Servicemembers Group Life Insurance.

(ii) Traumatic Servicemembers Group Life Insurance.

(iii) Social Security disability benefits.

(iv) Social Security survivor benefits.

(v) Prior Government contributions to a Thrift Savings Plan.

(vi) Commissary, exchange, and morale, welfare, and recreation facility access.

(vii) Value of legal assistance and other services provided by DoD.

(viii) Medical care provided while in active service or in an active status prior to death, retirement, or separation.

Dated: October 12, 2023.

Patricia L. Toppings,

OSD Federal Register Liaison Officer,

Department of Defense.

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