

**38 CFR Part 3****RIN 2900-AR76****Reevaluation of Claims for Dependency and Indemnity Compensation**

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its adjudication regulations concerning certain awards of Dependency and Indemnity Compensation (DIC). Under this amendment, relevant claimants will be eligible to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This amendment incorporates legislative changes enacted by the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 and will bring Federal regulations into conformance with those changes.

DATES: This rule is effective [insert date 60 days after date of publication in the FEDERAL REGISTER]. Federal law requires VA to set the effective date of major rules such as this rule no sooner than 60 days after publication in the Federal Register. 5 U.S.C. 801(a)(3).

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SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on March 22, 2023, at 88 FR 17166, VA proposed to amend its adjudication regulations

concerning certain awards of DIC. Under this amendment, relevant claimants will be eligible to elect to have certain previously denied DIC claims reevaluated pursuant to changes that establish or modify a presumption of service connection. Any award as a result of the reevaluation may be made retroactive as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim. This amendment incorporates legislative changes enacted by section 204 of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, or the Honoring our PACT Act of 2022, [Public Law 117-168](#) (herein referred to as “the PACT Act”). The 60-day public comment period ended on May 22, 2023.

VA received three comments. While VA appreciates the commenters’ concerns, several of the comments are unrelated to the reevaluation of claims for DIC under section 204 of the PACT Act. VA will not make any changes to the rule as proposed based on these comments. Nevertheless, VA provides the following responses and highlights the limitations of this rule based on section 204 of the PACT Act.

The first commenter urged the necessity of proposed bill H.R. 3518, the “Victims of Agent Orange Relief Act of 2021.” In particular, the commenter emphasized that “[t]here is a growing group of daughters of [A]gent [O]range male Veterans that have been ignored for years!” According to [Congress.gov](#), H.R. 3518 was introduced in the House and referred to the Committees on Veterans’ Affairs, Foreign Affairs, and Energy and Commerce on May 25, 2021. The Committee on Energy and Commerce then referred the resolution to the Subcommittee on Health on May 26, 2021, which was the most recent action. As noted in the resolution’s summary, “[u]nder the bill, certain benefits will be made available to the children of male Vietnam veterans who are affected by certain birth defects. Currently, these benefits are only available to the

children of women Vietnam veterans.”¹ Precisely, according to its text, the bill sought, in relevant part, to amend subchapter II of chapter 18 of 38 U.S.C. by striking all references to “women” Vietnam Veterans, a change that would have the effect of expanding eligibility to the children of male Vietnam Veterans as noted in the summary. The bill has so far not been enacted, and therefore it can have no bearing on this or any other VA rulemaking.

The second commenter praised the benefits of the PACT Act but highlighted three areas where the proposed rule was “underinclusive:” (1) only DIC claims, and not Veteran’s disability claims, can be awarded retroactive to the original filing date following a reevaluation; (2) only previously denied DIC claims where a reevaluation was elected, and not pending claims for DIC, may be afforded a retroactive award; and (3) the reevaluation process may only be initiated by the original claimant. The third commenter also raised the issue of DIC claims, and not live Veterans’ disability claims, being eligible for the special retroactive treatment. To address these concerns, VA provides the following responses and highlights the limitations of this proposed rule based on section 204 of the PACT Act.

First, the new regulation codified by this final rule, 38 CFR 3.33, focuses solely on reevaluations of previously denied DIC claims as discussed in section 204 of the PACT Act. Therefore, understanding the limitations of section 204 of the PACT Act, this regulation cannot extend retroactivity to the original filing date following a reevaluation for a Veteran’s disability claim. Of note, VA intends to implement the PACT Act’s provisions on disability benefits in a separate rulemaking. See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2022, 88 FR 10966, 11120 (Feb. 22, 2023) (“Updating VA Adjudication Regulations for Disability or

¹ Text - H.R.3518 - 117th Congress (2021-2022): Victims of Agent Orange Relief Act of 2021, H.R.3518, 117th Cong. (2021), *available at* <https://www.congress.gov/bill/117th-congress/house-bill/3518/text>.

Death Benefits Based on Toxic Exposure.”). The separate rulemaking on disability benefits would have its own notice-and-comment period.

Second, the retroactive provisions within the new regulation are limited to the reevaluation of a previously denied claim for DIC and do not apply to retroactivity for a pending DIC claim received by VA but not yet decided. This conforms to the application of the requirements within 38 U.S.C. 1305(a)(3), as added by section 204(a) of the PACT Act. Retroactive application is not authorized for the additional presumptive diseases prescribed within the PACT Act outside of section 204. We note that this commenter raised the concern of a DIC claimant whose claim is awaiting review by the Board of Veterans' Appeals at the time the new presumption goes into effect, potentially losing multiple years' worth of benefits. The commenter's concern proceeds from the premise that a claim cannot qualify for special retroactive treatment under section 204 of the PACT Act while the claim is pending on appeal. The statute requires only that the claim have been "denied," not that the denial have become final due to either passage of the appellate review period or final denial on appeal. We do not believe there is any textual ambiguity on this point. However, to the extent some may disagree, VA notes that disqualifying a DIC claim from special retroactive treatment due to a pending appeal would have the perverse effect of disincentivizing claimants from pursuing their appellate rights. This is particularly concerning in light of the fact that a claimant would have to be making the decision of whether to appeal before he or she knew with certainty whether the new presumption would in fact go into effect. Accordingly, VA now clarifies that an initial denial at the regional office level is all that is needed. We acknowledge that even under this interpretation, the commenter's concern retains some force in the context of a claim that is awaiting a decision when the presumption goes into effect. This outcome is unavoidable, however, as in this situation there is no denial available to trigger application of the statutory language. VA notes that in this scenario,

the effective date difference between the original claim date and the effective date of the new presumption ordinarily should be minimal.

Third, as noted in the proposed rulemaking, the PACT Act is silent on the accrued benefits or substitution processes as they relate to the reevaluation of previously denied DIC claims. As such, VA must utilize the existing processes regarding accrued benefits and substitution contained in 38 U.S.C. 5121 and 5121A. Thus, a claimant may request to be substituted for the original claimant for the purposes of processing a DIC reevaluation claim to completion, but only if the original claimant elected to have the previously denied DIC claim reevaluated.

Of note, federal law allows substitution only for claims that are already pending at the time of the claimant's death. 38 U.S.C. 5121A(a)(1). Consistent with that restriction, the PACT Act expressly allows reevaluation only "at the election of *the claimant*." 38 U.S.C. 1305(a)(2) (italics added). So, if a DIC claimant dies before requesting reevaluation under the PACT Act, there is no mechanism available allowing the claim to be reevaluated by a party secondary to the DIC claimant. VA makes no changes to the rule based on these comments.

The third commenter offered general observations on the PACT Act's implications for "retroactive disability payments" and "original effective dates," and requested retroactive benefits for himself based on the PACT Act effective to the original date of his claims for disability compensation that VA previously denied. These comments are unrelated to the reevaluation of claims for DIC under section 204 of the PACT Act, as such they will not result in any changes being made to the rule. As noted, VA intends to implement the PACT Act's provisions on disability benefits in a separate rulemaking.

Of note, when VA grants an award based on a change in law (like the PACT Act), federal law generally limits the effective date of that award to no earlier than the

effective date of the change in law. 38 U.S.C. 5110(g). That same law also provides that “[i]n no event” may the effective date of an award granted because of a change in law be earlier than one year before the date of the associated claim or the date of the administrative determination of entitlement, whichever date is earlier. Therefore, if a Veteran files a PACT Act claim and VA grants the claim, the Veteran could still obtain these limited periods of retroactivity, but the law limits the effective date of that grant to no earlier than one year before the Veteran filed the claim, and no earlier than the effective date of the change in law.

VA recognizes the concern that the second and third commenters have raised regarding the different retroactive effective date treatments between DIC claims and disability compensation claims for live Veterans. It is understandable that a Veteran who has been living with a disability for some time before that disability became subject to presumptive service connection would object to this difference, as these two commenters have. Congress has determined that claims for service-connected death should receive special retroactive effective dates, while compensation claims for living Veterans must continue to be subject to traditional effective date rules.

VA does not have authority to contradict ordinarily applicable statutory effective date law. As the U.S. Supreme Court explained in January 2023, the effective date provisions in section 5110 of title 38, United States Code, are not only time constraints, but they also express Congress’s intent to limit, subject to enumerated exceptions, the amounts of payments Veterans may receive. *Arellano v. McDonough*, 143 S. Ct. 543, 549 (2023). The constraints in 38 U.S.C. 5110(g) therefore apply unless displaced by a specific statutory effective date mechanism, as Congress did here for DIC. We note that if a DIC claim (or any claim) was pending when the PACT Act went into effect, VA will, and indeed must, complete the processing of that claim to determine if an earlier effective date on a direct basis (as distinguished from a presumptive basis) is possible.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs 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 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under Executive Order 12866, Section 3(f)(1), as amended by Executive Order 14094. 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 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). 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 would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This final rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval. OMB has reviewed and approved this revised collection of information.

Congressional Review Act

Under the Congressional Review Act, this regulatory action may result in an annual effect on the economy of \$100 million or more, 5 U.S.C. 804(2), and so is subject to the 60-day delay in effective date under 5 U.S.C. 801(a)(3). In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this Regulation and the Regulatory Impact Analysis (RIA) associated with the Regulation.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on November 16, 2023, 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.

Luvenia Potts,

*Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of General Counsel,
Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs amends 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. Remove the undesignated center heading “General” following § 3.32 and add § 3.33 to read as follows:

§ 3.33. Reevaluation of Claims for Dependency and Indemnity Compensation Involving Presumptions of Service Connection Following Enactment of Public Law 117-168.

(a) *Purpose.* This section states effective date and election rules based on amendments made under Public Law 117-168, which provides for the reevaluation of certain previously denied dependency and indemnity compensation (DIC) claims when a law establishes or modifies a presumption of service connection.

(b) *Definitions.* For purpose of this section:

(1) *Law* means any law, regulation, or Federal court decision or settlement establishing or modifying a presumption of service connection.

(2) *Relevant claimant* means an individual who submitted a claim for DIC to VA that was evaluated and denied by VA before the date on which such a provision of law went into effect and might have been evaluated differently had the establishment or modification of the service connection presumption been applicable to the claim.

(c) *Election of review*—(1) *General*. VA will not reevaluate under this section any previously denied claim for DIC prior to election by the relevant claimant.

(2) *Form of election*. Reevaluation of a previously denied DIC claim must be at the election of the relevant claimant on a prescribed form pursuant to § 3.152(a).

(d) *Effective date of award*. If a relevant claimant is found entitled to DIC based on the establishment or modification of a presumption of service connection, the effective date of the award will be as follows:

(1) If VA denied a claim for DIC prior to a law defined under (b)(1) of this section that establishes or modifies a presumption of service connection on or after August 10, 2022 (the date of enactment of Pub. L. 117-168), the effective date of the award will be determined as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim.

(2) If the requirements of paragraph (d)(1) are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(e) *Outreach and identification of relevant claimants*. (1) VA will conduct the following efforts to inform relevant claimants that they may elect to have a claim reevaluated in light of the establishment or modification of a presumption of service connection:

(i) Publish on the internet website of the Department a notice that such claimants may elect to have a claim so reevaluated;

(ii) Notify, in writing or by electronic means, veterans service organizations of the ability of such claimants to elect to have a claim so reevaluated; and

(iii) Notify each such claimant in the same manner that the Department last provided notice of a decision.

(Authority 38 U.S.C. 501, 1305)

[FR Doc. 2023-25836 Filed: 11/22/2023 8:45 am; Publication Date: 11/24/2023]