



DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AP86

Active Service Pay

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its adjudication regulations to permit VA to adjust disability compensation payments under certain circumstances upon receipt of notice from the Department of Defense (DoD) that the veteran has received or is receiving active service pay. The effect of this action is to reduce overpayments and erroneous payments associated with receipt of VA disability compensation and DoD active service pay by allowing VA to make necessary adjustments as close in time to the receipt of active service pay as possible. Additionally, the amendments will allow VA to resume payments discontinued due to receipt of active service pay based on information received from DoD. The amendments will also clarify how VA adjudicates benefit adjustments based on a veteran's receipt of active service pay for certain types of service.

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

FOR FURTHER INFORMATION CONTACT: Robert Parks, Chief, Regulations Staff (211C), Compensation Service (21C), Veterans Benefits Administration,

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SUPPLEMENTARY INFORMATION: On April 19, 2019, VA published a proposed rule in the Federal Register at 84 FR 16421 to amend 38 CFR 3.103 and 3.654 to permit VA to suspend disability compensation payments upon receipt of notice from DoD that the veteran has received or is receiving active service pay and to clarify how VA adjudicates benefit adjustments based on receipt of active service pay for certain types of service. Section 5304(c) of title 38, United States Code, provides that pension, compensation, or retirement pay shall not be paid for any period in which a veteran receives active service pay. Currently, VA cannot take immediate action on DoD-provided information but rather must provide a veteran with notice of a proposed adverse action -- such as suspension of disability compensation payments -- and 60 days to provide evidence showing why the adverse action should not be taken. VA continues to pay benefits during this 60-day period. This becomes problematic for some veterans on active duty serving in remote locations, such as a combat zone or similarly austere environments, with infrequent mail service and no reasonable method for dealing with financial matters. As a result of this rulemaking, VA will be able to leverage technological advancements and process benefit adjustments based upon information received from DoD regarding a veteran's receipt of active service pay under certain circumstances, described in more detail below.

VA invited interested persons to submit written comments on or before June 18, 2019. VA received four comments in response to the proposed rule. VA received comments from two organizations, National Organization of Veterans' Advocates, Inc. (NOVA) and Disabled American Veterans (DAV), and two

members of the public. Some comments addressed more than one issue. In those instances, VA reviewed and considered each issue independently. VA also grouped all of the issues raised by the commenters that concerned at least one portion of the rule together by topic. VA organized the responses to the comments by topic. The responses to the comments are as follows:

I. Remove Reference to Prospective Receipt of Pay

Two comments requested the removal of the phrase “will receive active service pay,” in the proposed regulatory text in 38 CFR 3.103(b)(3)(v). One commenter asserted that suspending compensation based on notice that a veteran will receive active service pay is inconsistent with 38 U.S.C. 5304(c). The commenter also contended that active duty dates could change, or receipt of active service pay could be delayed, potentially creating a situation where a veteran has his/her compensation suspended but does not receive active service pay. The other commenter asserted that including the language “will receive active service pay” increases the risk that someone will have benefits suspended before he or she is actually receiving active service pay.

Concerning notice from DoD, VA clarifies that DoD will not inform VA of prospective active service pay, only past and current pay. VA revises § 3.103(b)(3)(v) to clarify that veterans can submit notice concerning past, current, and future receipt of active service pay, and DoD notice will only pertain to past or current receipt of active service pay. Accordingly, changes will not be made on the basis of notice of prospective pay from DoD.

Concerning notice provided to VA by a veteran, VA will continue to take action, without any advance notice period, based on statements by a veteran indicating that the veteran will receive active service pay. Payments, however, are discontinued effective the day preceding reentrance on active duty, not as of

the date of receipt of the notice. If a veteran informs VA prior to the discontinuance of payments that the dates of service have changed or the veteran will no longer return to service, VA will make the necessary adjustments prior to the discontinuance if time allows and will otherwise reinstate benefits the same day they were discontinued. In the case of training pay, benefits are withheld for the number of training days in the relevant time period. If a veteran provides timely notice that pay was not received for expected training duty, retroactive payments will be authorized. 38 CFR 3.654(c). Therefore, VA does not agree that dispensing with the 60-day notice period in this situation is inconsistent with 38 U.S.C. 5304(c), which precludes concurrent receipt of VA compensation and active service pay.

II. Expedited Review

One comment recommended that VA provide an expedited review process for veterans who allege error in the suspension of compensation benefits based on notice of receipt of active service pay. VA points out that, due to the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, veterans who disagree with a decision by VA have options including requesting a higher-level review if additional evidence is not needed to resolve the matter or filing a supplemental claim if additional evidence is needed. VA's goal for completing higher-level reviews and supplemental claims is 125 days. Therefore, there are avenues for review of such allegations of errors to receive expeditious processing in the current claims processing framework. VA makes no changes based on this comment.

III. General

VA received two general comments that were not associated with preventive efforts to reduce the financial burden on veterans of overpayments

due to concurrent receipt of both VA disability compensation and DoD active service pay. One commenter expressed disagreement with the proposed rule, stating that veterans should be compensated more, not less. This rulemaking affects the process for making necessary adjustments based on receipt of active service pay, not the amount of compensation to which a veteran is entitled. Section 5304(c) of title 38, United States Code, clearly precludes concurrent receipt of VA compensation and active service pay. VA does not have authority to ignore this statutory command in order to provide veterans additional compensation. The commenter also discussed concerns for veterans with mental health symptoms. VA makes no changes based on this comment as it is beyond the scope of this rulemaking.

The other comment consisted of a consent agreement from a banking institution without any accompanying text describing why the document was submitted as a comment or how it pertains to active service pay. This comment is not relevant to the rule amendment; therefore, VA makes no changes based on this comment.

IV. Resuming Payments Based on DoD Notice

Based on further agency consideration, VA makes additional changes to the proposed rule. VA proposed amendments to allow VA to suspend disability compensation payments based on notice from DoD of receipt of active service pay, explaining that the regulatory change would reduce the financial impact on veterans associated with receipt of VA disability compensation and DoD active service pay as well as reducing the reporting burden on veterans in cases where VA receives information directly from DoD. 84 FR 16421 (April 19, 2019). VA also explained that VA and DoD were discussing changes to the way VA receives notification that a veteran has received active service pay. 84 FR at

16423. VA has determined that, in addition to discontinuing payments based on DoD notice under certain circumstances, described in more detail below, it will be possible in many cases to resume payments based on information received from DoD. This will reduce the reporting burden on veterans in cases where VA receives information directly from DoD. There may be cases, however, where VA does not receive timely notice of a veteran's release from active duty or active duty for training from DoD. Therefore, VA revises 38 CFR 3.654(b)(2) to allow VA to resume payments based on notice from DoD that a veteran has been released from active duty or active duty for training while maintaining the option for the veteran to inform VA of such release by filing a claim to recommence payments. If VA receives notice from DoD or a claim for recommencement of payments within one year from the date of release from active duty or active duty for training, payments, if otherwise in order, will be resumed effective the day following release. Otherwise, payments will be resumed effective one year prior to the date of receipt of a new claim. Resuming payments based on notice from DoD is consistent with VA's goal, described in the proposed rule, of minimizing the financial impact and reporting burdens for veterans resulting from the prohibition on concurrent receipt of VA benefits and active service pay. VA therefore considers resuming benefit payments based on notice from DoD to be a logical outgrowth of the proposed rule. We emphasize that VA considers the automatic resumption of payments based on DoD notice to generally be a liberalizing change that should generally expedite access to benefits and reduce the need for administrative action on the part of both the veteran and VA.

As a corollary to this change, VA has added language clarifying that a claim for increase must be filed in order for additional benefits to be paid. This is not a change to existing requirements, as the relevant statute and regulation tie

the effective date of an award of increased compensation to the date of receipt of claim. 38 U.S.C. 5110(b)(3); 38 CFR 3.400(o)(2). Rather, VA included the clarification as a reminder that, even if VA resumes payments based on receipt of notice from DoD that a veteran has been released from service, the veteran must still file a claim for increase if he or she seeks an increased rating.

In a similar manner, VA has revised the language regarding resumption of compensation payments to reflect that the resumption will be based on the combined evaluation in effect at the time payments were discontinued. If a reduction in disability evaluation is warranted that would not lower the combined evaluation, the reduction may be processed at the same time as the resumption of payments, as the overall payment will not be affected. If VA determines that a reduction in evaluation is warranted that would lower the combined evaluation, the reduction will be governed by 38 CFR 3.105(e), after payments are resumed at the level previously in effect. This will ensure that veterans receive notice of any proposed reductions to the compensation in effect at the time payments were discontinued, even if resumption of payments is based on notice from DoD.

V. Addressing Concerns about Notice

Upon additional review it was determined that the proposed rule conflicted with the Privacy Act, specifically 5 U.S.C. 552a(p), which requires notice to an individual prior to an agency taking adverse action as a result of information produced by a matching program. To address this conflict, we have amended the rule so that VA will only suspend compensation based on information from DoD without additional advance notice when the veteran has previously received 30-day advance notice addressing concurrent receipt of compensation and payment for the type of service at issue as well as notice that suspension of compensation payments based on subsequent payments for the same type of service will be

made without additional advance notice. We have also specified that in cases to which 38 CFR 3.700(a)(1)(iii) applies, in order for the exception to advance notice contained in § 3.103(b)(3)(v) to apply, VA must have received a waiver of VA benefits. A one-time advance notice with respect to the first instance of double payments would provide clear notice of the basis for the suspension of compensation payments, and an opportunity to contest the findings that led to the suspension, and could be applied to all subsequent payments of the same benefit during periods of receipt of active service pay for the same type of service. This change satisfies the notice requirements of the Privacy Act, and in particular 5 U.S.C. 552a(p)(1)(C)(ii), while still achieving the modernizing, pro-veteran goals of the proposed rule. While this solution will not eliminate the initial overpayment to an individual receiving both active service pay and disability compensation, it will eventually result in a dramatic decrease in the overall number of overpayments while providing each individual with the due process intended by the notice requirement. VA believes it is clear this result is a logical outgrowth of the proposed rule.

The proposed rule would have allowed for suspension of compensation without advance notice to the veteran based on information from DoD as long as the veteran had received prior notice that receipt of active service pay precludes concurrent receipt of VA benefits or VA had received a statement from the veteran indicating knowledge of such preclusion. The final rule will only allow for suspension of compensation without advance notice based on information from DoD if the veteran also received, on a previous occasion of concurrent receipt of compensation and payment for the type of service at issue, advance notice of the suspension and notice that suspension of compensation payments based on subsequent payments for the same type of service would be made without

additional advance notice. In other words, the final rule provides greater protection to the individual, in terms of the suspension of running compensation payments. *See Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1344-45 (Fed. Cir. 2016) (finding a final rule that adopted a different, but more liberal approach than the proposed rule to be a logical outgrowth of the proposed rule).

We have updated the language in 38 CFR 3.103(b)(3)(v) to ensure that a written or electronic statement provided to VA by a veteran is consistently referred to as a statement. We have also updated the reference in 38 CFR 3.654(b)(2) to the second period of service, replacing that term with the most recent period of service, as veterans may have more than two periods of service. Finally, we made stylistic changes in 38 CFR 3.654, replacing references to “1 year” with “one year.” This document adopts as a final rule the proposed rule published in the Federal Register on April 19, 2019 with changes as set forth below.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) 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 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 not a significant regulatory action under Executive Order 12866, 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). The factual basis for this certification is based on the fact that no small entities or businesses make decisions regarding payments or overpayments of VA service-connected disability compensation. 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 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), the collection of information for OMB is assigned control number 2900-0463, and must be paired with this rulemaking action for OMB review and approval.

There are no provisions associated with this rulemaking constituting any new collection of information, but there are anticipated burden changes to the existing collection of information. The respondent population for VA Form 21-8951-2 is composed of individuals filing a waiver of either VA disability benefits or military pay and allowances. VA currently batch sends pre-populated, optional forms to those identified as possible dual recipients and receives back approximately 12.4% for manual processing (71% are electronically processed without a form after notice and expiration of the due process period and the remaining 16.6% cannot be processed by the batch program due to expired addresses, returns to active duty, death, etc.). VA expects this process to continue unchanged for 1-2 years (with a simultaneous communication plan to spread knowledge of the new program), then the number of batch forms being mailed will significantly decrease due to the number of veterans who have responded (currently 12.4%) and who will no longer receive the initial letter with the VA Form 21-8951-2, with a concomitant reduction in the burden.

VA estimates the total annual reporting and recordkeeping burden to be 207 hours. (Estimated 1,240 respondents x (multiplied by) 10 (burden minutes) / (divided by) 60 = 207 burden hours.) VA estimates the total information collection burden cost to be \$6,160.32 per year (207 burden hours x \$29.76 per hour). The Bureau of Labor Statistics (BLS) gathers information on full-time wage and salary workers. According to the latest available BLS data, the mean hourly wage is \$29.76 based on the BLS wage code – “00-0000 All

Occupations.” This information was taken from the following website:

https://www.bls.gov/oes/current/oes_nat.htm.

The currently approved OMB control number 2900-0463 burden costs are \$65,293.44 (2,194 burden hours x \$29.76 per hour). The projected annual burden savings from implementation of this regulation are \$55,655.87.

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).

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on December 6, 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.

Jeffrey M. Martin,

Assistant Director,

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. Amend § 3.103 by revising paragraph (b)(3)(v) and adding a cross reference paragraph to the end of the section to read as follows:

§ 3.103 Procedural due process and other rights.

* * * * *

(b) * * *

(3) * * *

(v) An adverse action based upon a written or electronic statement provided to VA by a veteran that indicates that the veteran has received, is in receipt of, or will receive active service pay as defined by § 3.654(a), or, in the case of compensation, written or electronic notice from the Department of Defense that indicates that the veteran has received or is in receipt of active service pay as defined by § 3.654(a), provided that, in cases involving notice from the Department of Defense, the veteran has on a previous occasion of concurrent receipt of compensation and payment for the type of service at issue received the notice described in paragraph (b)(2), but with a period of 30 rather than 60 days to respond, as well as notice that suspension of compensation payments based on subsequent payments for the same type of service will be made without additional advance notice. The statement from the veteran or notice from the Department of Defense must include the date on which the

service resulting in receipt of active service pay began or, in the case of a statement from the veteran, the date on which the service resulting in receipt of active service pay is expected to begin, or, in the case of training duty, the number of training days performed, or, in the case of a statement from the veteran, the number of training days expected to be performed, during a specified period of time (e.g., last month, last quarter, last year, next month, etc.). In order for this paragraph to apply, the veteran must have received prior notice that receipt of active service pay precludes concurrent receipt of VA benefits, or VA must have received a statement from the veteran that indicates knowledge of such preclusion. In cases to which § 3.700(a)(1)(iii) of this part applies, the Veteran must also have waived VA benefits. When notice provided by the Department of Defense contains information indicating that the monthly level of disability compensation for a veteran exceeds the veteran's monthly active service pay rate, the exception contained in this paragraph will only apply to a written or electronic statement provided to VA by the veteran.

* * * * *

CROSS REFERENCES: Submission of statements or information affecting entitlement to benefits. See § 3.217(a). Active Service Pay. See § 3.654. General. See § 3.700(a)(1).

3. Amend § 3.654 by revising paragraphs (b) and (c) and adding an authority citation to read as follows:

§ 3.654 Active service pay.

* * * * *

(b) *Active duty or active duty for training.* (1) Where the veteran receives active service pay as a result of returning to active duty status or active duty for training as described in § 3.6(c), with the exception of annual active duty for

training typically performed 15 days each year by reservists and members of the National Guard and Active Duty for Special Work to receive training (see paragraph (c) of this section), the award will be discontinued effective the day preceding reentrance into active duty or active duty for training status. If the exact date is not known, payments will be discontinued effective date of last payment, and the effective date of discontinuance will be adjusted to the day preceding reentrance when the date of reentrance has been ascertained from the service department.

(2) Payments, if otherwise in order, will be resumed effective the day following release from active duty or active duty for training if notice from the Department of Defense of such release or a claim for recommencement of payments is received within one year from the date of such release; otherwise, payments will be resumed effective one year prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in § 3.105. Compensation will be resumed based on the combined evaluation in effect at the time payments were discontinued. If a reduction in evaluation that lowers the combined evaluation is considered warranted, the provisions of § 3.105(e) will apply. If a disability is incurred or aggravated, or a service-connected disability worsens in the most recent period of service, compensation for that disability or increase in disability cannot be paid unless a claim therefor is filed.

(c) *Training duty.* Prospective adjustment of awards may be made where the veteran waives his or her Department of Veterans Affairs benefit covering anticipated receipt of active service pay because of expected periods of active duty for training (annual active duty for training typically performed 15 days each year by reservists and members of the National Guard or Active Duty for Special

Work to receive training) or inactive duty training. Where readjustment is in order because service pay was not received for expected training duty, retroactive payments may be authorized if a claim for readjustment is received within one year after the end of the fiscal year for which payments were waived.

(Authority: 38 U.S.C. 501(a) and 5304(c).)

[FR Doc. 2023-27176 Filed: 12/11/2023 8:45 am; Publication Date: 12/12/2023]