



38 CFR Part 17

Instructions for Determining Eligibility for In Vitro Fertilization (IVF) Benefit

AGENCY: Department of Veterans Affairs.

ACTION: General policy statement.

SUMMARY: The Department of Veterans Affairs (VA) announces that the Secretary of Veterans Affairs issued Instruction of the Secretary 01–24 on March 28, 2024, which addresses the expansion of eligibility for IVF benefits to qualified Veterans and their spouses. VA’s authority to provide assisted reproductive technology (ART) benefits to veterans and their spouses, including IVF coverage, references the benefits the Department of Defense (DoD) provides to active-duty service members. The primary benefit provided by VA under this authority is IVF. DoD previously limited the IVF benefit to service members who had a Category II or III injury or illness and who together with their legal spouse could produce and carry a child who is biologically their own. This limitation effectively limited the benefit to service members who were legally married and capable of producing their own sperm and eggs (gametes) within that marriage. On March 8, 2024, DoD amended its policy to cover IVF for service members with a qualifying injury or illness who are unmarried and to allow donated gametes and embryos. VA is amending its IVF policy to adopt conforming changes.

DATES: Instructions for Determining Eligibility for IVF Benefit is effective March 28, 2024.

FOR FURTHER INFORMATION CONTACT: Sally G. Haskell, MD, MS, Acting Chief Officer, Office of Women’s Health, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202-461-0373.

(This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Instruction of the Secretary 01–24

Notice is given that the Secretary of Veterans Affairs issued Instruction of the Secretary 01–24— Instructions for Determining Eligibility for In Vitro Fertilization (IVF) Benefit on March 28, 2024. The text of Instruction of the Secretary 01–24 appears at the end of this *Federal Register* document.

Background

On April 3, 2012, DoD implemented its IVF policy in a memorandum titled “Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members,” accompanied by implementation guidance (collectively referred to throughout this document as the “DoD Policy”). The DoD Policy restricted the benefit to service members with a qualifying injury or illness who, together with their legal spouse, were able to produce and carry a child who is biologically their own. This effectively limited the benefit to service members who were legally married and capable of producing a child who is biologically related to the service member and their spouse.

Since 2016, Congress has authorized VA to use medical services funds to provide ART benefits, which includes IVF coverage, to covered veterans or to provide fertility treatment services including ART to the spouses of covered veterans as provided to a member of the Armed Forces under the DoD Policy. Public Law 114-223, Division A, Title II, section 260 (Sept. 29, 2016). Congress defined a “covered veteran” to be one who has a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment. Congress has continued to reauthorize the use of medical services funds for this purpose in subsequent appropriations laws, most recently in March 2024 in Public Law 118-42, Division A, Title II, section 234.

VA implemented Congress's authorization by issuing 38 CFR 17.380 and 17.412, which clarified the definition of a covered veteran for the purposes of establishing eligibility for IVF coverage and authorized fertility treatment of the legal spouse of a covered veteran, respectively. VA also issued VHA Directive 1334 establishing the full eligibility criteria for IVF coverage, including the applicable restrictions contained in the DoD Policy.

On March 8, 2024, DoD amended the DoD Policy to eliminate the requirement that to receive IVF and other ART services, an active-duty service member, along with their legal spouse, be able to produce and carry a child who is biologically their own. In the amended policy, DoD expressly stated that eligibility would not be based on marital status and that donor sperm, eggs, and embryos may be used in ART services, including IVF.

VHA Directive 1334, paragraph 1.c. provides that any substantive changes made to DoD's policy will supersede conflicting terms in VHA Directive 1334. Therefore, in Instruction of the Secretary 01-24, issued on March 28, 2024, the Secretary has directed VA employees and officials to revise VHA Directive 1334 to eliminate the requirement that a covered veteran to be married and be able to produce and carry a child who is biologically their own in order to qualify for IVF coverage. These revisions allow VA to provide IVF services for an unmarried covered veteran. The revisions also allow for the use of donor sperm, eggs, or embryos, as long as the donated sperm, eggs, and embryos are provided at no cost to VA. Effectively, the revisions to VHA Directive 1334 allow VA to expand the provision of IVF services to covered veterans who are unmarried, married to a partner who does not have opposite-sex gametes, and/or incapable of producing their own sperm and/or eggs.

Instruction of the Secretary 01-24 does not eliminate the statutorily imposed requirement that a veteran must have a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment to be considered

a “covered veteran.” However, the Instruction clarifies that the definition of “a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment” provided for female veterans who have ovarian function and a patent uterine cavity in 38 CFR 17.380 will also apply to female veterans without ovarian function or a patent uterine cavity. Previously, no definition was provided for the female veteran population that did not have ovarian function or a patent uterine cavity because the exclusion of donor sperm, eggs, and embryos eliminated them from eligibility. Now, the Secretary clarifies they must meet the same definition as female veteran with ovarian function and a patent uterine cavity to be considered a “covered veteran.”

Text of Instruction of Secretary 01-24

**MEMORANDUM FOR THE UNDER SECRETARY FOR HEALTH AND THE
CHAIRMAN, BOARD OF VETERANS APPEALS**

SUBJECT: Instructions for Determining Eligibility for In Vitro Fertilization (IVF) Benefit.

Purpose

1. I am issuing this instruction to clarify the impact for the Department of Veterans Affairs (VA or the Department) of the amendment to the Department of Defense (DoD) Policy for Assisted Reproductive Services (ART) for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members (hereinafter referred to as the “DoD Policy”) issued by DoD on March 8, 2024. The amendments to the DoD Policy are substantive and have superseded the conflicting terms of VHA Directive 1334(1), In Vitro Fertilization Counseling and Services Available to Certain Eligible Veterans and Their Spouses, dated March 21, 2021, in accordance with paragraph 1.c. of that Directive.

2. I am instructing VA employees to not restrict eligibility for IVF services based on marital status or the ability to produce opposite-sex autologous gametes, as described in more detail below. Furthermore, the use of donor gametes and donor embryos in the provision of the IVF benefit will be allowed.

3. Additionally, I am issuing this instruction to clarify the impact of the policy changes on the definition of “a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment”, found in 38 CFR 17.380, as the current definition does not contemplate the use of donor gametes and donor embryos.

4. I am instructing Department employees to interpret the term “a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment” as defined for a female veteran with ovarian function and a patent uterine cavity in 38 CFR 17.380 to also apply to a female veteran without ovarian function or a patent uterine cavity.

Background

5. The National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, section 1633, 122 Stat. 3, 459 (2008), authorized DoD to provide IVF benefits for certain service members.

6. On April 3, 2012, DoD implemented its IVF policy in a memorandum titled “Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members,” accompanied by implementation guidance (collectively referred to throughout this document as the “DoD Policy”).

7. DoD Policy clause IIIA provided:

It is the intent of this policy to provide In vitro (sic) Fertilization (IVF) services only to consenting male members whose injury or illness prevents the successful delivery of their sperm to their spouse’s egg and to consenting female members whose injury or illness prevents their egg

from being successfully fertilized by their spouse's sperm but who maintain ovarian function and have a patent uterine cavity.

8. DoD Policy clause III E provided:

Third-party donation and surrogacy are not covered benefits- the benefit is designed to allow the member and spouse to become biological parents through reproductive technologies where Active Duty injury or illness has made it impossible to conceive naturally.

9. Since 2016, Congress has authorized VA to use medical services funds to provide fertility counseling and treatment, including ART, to certain covered veterans and to the spouses of covered veterans. Public Law 114-223, Division A, Title II, section 260 (Sept. 29, 2016).

10. Congress defined a covered veteran to be one who has a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment. *Id.* Congress continued to authorize the use of medical services funds for this purpose in subsequent appropriations laws, most recently in March 2024 in Public Law 118-42, Division A, Title II, section 234.

11. On March 7, 2019, VA published the final rule creating 38 CFR 17.380 implementing Congress's authorization. The regulation provided in pertinent part:

For the purposes of this section, "a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment" means, for a male veteran, a service-connected injury or illness that prevents the successful delivery of sperm to an egg; and, for a female veteran with ovarian function and a patent uterine cavity, a service-connected injury or illness that prevents the egg from being successfully fertilized by sperm.

The regulation provides a definition “for a male veteran” and “for a female veteran with ovarian function and a patent uterine cavity”. It does not provide a definition for female veterans without ovarian function and/or without a patent uterine cavity.

12. As a result, female veterans without ovarian function and/or a patent uterine cavity are in an undefined area of eligibility, neither expressly excluded nor expressly included in 38 CFR 17.380. This may inadvertently result in veterans who sustained service-connected disabilities affecting ovarian function and/or the uterine cavity not being considered “covered veterans” for the purposes of fertility benefits.

13. In March 2021, VA issued subregulatory guidance in the form of VHA Directive 1334 to implement its policy for providing IVF counseling and services to eligible veterans and their spouses.

14. VHA Directive 1334, paragraph 1.c., Purpose, notes that DoD Policy governs VA’s provisions for IVF counseling and services, and any substantive changes made to DoD’s policy will supersede conflicting terms in VHA Directive 1334.

15. On the basis of DoD Policy clauses IIIA and IIIE, VHA Directive 1334 had the effect of limiting VHA to providing IVF services to cisgender opposite-sex legally married couples or other legally married couples with opposite-sex gametes/reproductive organs.

16. On March 8, 2024, DoD Policy was amended. In relevant part, the amendments eliminated the language in Policy Clause IIIA referred to in paragraph 7, above. The amendment also removed the prohibition on the use of donor gametes in Policy Clause IIIE and expressly allows for the use of donor embryos in the fertility treatment of qualified service members, provided they are obtained at no cost to DoD. Further, the policy was amended to allow a qualified service-member to receive ART services, as clinically appropriate.

Qualifying as a Covered Veteran for Purposes of Receiving IVF Services

17. This Instruction addresses the effect of the DoD Policy amendment on VA's eligibility criteria for veterans and their spouses to receive IVF counseling and services through VHA. The amendment of the DoD Policy supersedes portions of VHA Directive 1334 which were based on the unamended DoD Policy. The amendment also necessitates clarification of the definition of a "service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment" in 38 CFR 17.380.

18. With the amendment to the DoD Policy, VA IVF benefits will no longer require that a covered Veteran be (1) married,¹ (2) in an opposite-sex relationship, or (3) able to produce their own gametes. Paragraphs 20 through 35 address these changes.

19. Further, lifting the prohibition on donor gametes and donor embryos necessitates clarification of the definition of "a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment" found in 38 CFR 17.380. The text of the regulation provides a definition for all male veterans but only provides a definition for a female veteran who has ovarian function and a patent uterine cavity. In that regard, the regulation does not provide a definition for a female veteran who does not have either ovarian function or a patent uterine cavity. The lack of a definition for a female veteran without ovarian function or a patent uterine cavity posed no problem in applying the regulation when there was a prohibition on the use of donated gametes and donated embryos because that prohibition would have prevented

¹ VA is only allowed to treat non-veterans when specifically authorized by statute. Public Law 117-328, Division J, Title II, section 234 authorizes VA to provide fertility counseling and identified treatment to "a covered veteran or the spouse of a covered veteran." Therefore, VA will not exclude unmarried veterans from IVF care as discussed throughout, but VA is only authorized to provide IVF care to the non-veteran partner of a veteran if that non-veteran partner is the spouse of the covered veteran.

such a female veteran from being eligible for IVF services. However, with the lifting of the prohibition on donor gametes and donor embryos, VA must address what the definitional requirements are for a female veteran without ovarian function and/or a patent uterine cavity. Paragraph 35, below, addresses these requirements.

20. VHA Directive 1334, paragraph 2.d., Background, is revised to read:

IVF counseling and services are available to certain seriously injured Veterans no longer able to procreate without the use of fertility treatment. For male Veterans, their service-connected injury or illness must render the Veteran incapable of successfully delivering their sperm to an egg. This definition includes the inability to produce sperm. For female Veterans, with or without ovarian function or a patent uterine cavity, their service-connected injury or illness must render the Veteran incapable of having an egg successfully fertilized by sperm. This definition includes the inability to produce an egg.

21. VHA Directive 1334, paragraph 2.e., Background, is revised to read:

VA may furnish IVF fertility counseling and treatment to Veterans as described herein and their lawful spouses. More specifically, consistent with the Memorandum, VA allows for assisted reproductive services, including evaluations, intrauterine insemination, sperm retrieval, oocyte retrieval, in-vitro fertilization, blastocyst transfer and embryo transfer, to be available to eligible Veterans. VA considers that the cryopreservation of gametes (for both the Veteran and the spouse), not only embryos, is within the scope of available benefits described in the Memorandum. Gamete and embryo cryopreservation and storage are each without limitation on duration until, as explained below, the death of an eligible Veteran. In determining clinical eligibility for IVF services, VA treating providers are to use the same evidence-based clinical eligibility

standards outlined in VHA Directive 1332(2), Fertility Evaluation and Treatment.

22. VHA Directive 1334, paragraph 2.f. and g., Background, are struck from the Directive.

23. VHA Directive 1334, paragraph 2.h., Background, is revised to read:

Covered veterans and their spouses may utilize donor gametes and donor embryos obtained at their own expense when receiving IVF counseling and services under this policy. No portion of this benefit will be used to pay for procedures or associated fees for the extraction, storage, or transportation of donor gametes. The creation, storage, and use of resulting embryos are covered by the benefit.

24. VHA Directive 1334, paragraph 2.j., Background, is revised to read:

Although the benefits of cryopreservation and storage of gametes and embryos are not time-limited, these benefits are, practically-speaking, checked or limited by the death of an eligible Veteran. This is also the practical implication of Clause III.F. of the Memorandum, which requires that VA obtain the separate consent of the Veteran with third party consent being prohibited.

25. VHA Directive 1334, paragraph 2.n., Background, is revised to read:

The Veteran's and spouse's respective eligibility determinations will be made by VHA's Health Eligibility Center. Service-connected conditions covered under this policy include, but are not limited to, poly-trauma, genitourinary injury and spinal cord injury and other anatomical, neurological, infectious and physiological injury and/or illness that are adjudicated by the Veterans Benefits Administration to be service-connected after which VHA IVF program staff will clinically determine if the service-connected condition meets the IVF clinical eligibility criteria i.e.,

whether the service-connected condition results in loss of procreative ability that cannot be corrected without the use of fertility treatment.

26. VHA Directive 1334, paragraph 3.c., Definitions, is revised to read:

Consent to In Vitro Fertilization. Consent to IVF requires the informed consent of all parties receiving IVF benefits under this policy. Each party must have decision-making capacity to consent to treatment. Consent by a third party, including a proxy decision-maker, is not permitted.

27. VHA Directive 1334, paragraph 3.d., Definitions, is revised to read:

Cryopreservation. Cryopreservation is the freezing of gametes (oocytes or sperm), zygotes (1-cell fertilized oocytes), embryos (typically cryopreserved on day 2, 3, 5, or 6 of development), or gonadal (ovarian or testicular) tissue to allow storage for future use. Cryopreserved sperm can be used for intrauterine insemination (IUI) or IVF after thawing or rewarming. Cryopreserved oocytes require IVF after thawing or rewarming. Cryopreserved tissue may be re-implanted into the body or cultured in vitro after thawing or rewarming. Duration of embryo cryopreservation and storage are without limitation under 38 CFR 17.380 and 17.412 until the death of an eligible Veteran, provided VA continues to have authority to provide these non-limited services.

28. VHA Directive 1334, paragraph 3.j., Definitions, is revised to read:

Infertility. Infertility is a disease, condition, or status characterized by any of the following:

(1) The inability to achieve a successful pregnancy as established by a patient's medical, sexual, and reproductive history, age, physical findings, diagnostic testing, or any combination of those factors; or

(2) The need for medical intervention, including, but not limited to, the use of donor gametes or donor embryos in order to achieve a successful pregnancy, either as an individual or with a partner.

29. VHA Directive 1334, paragraph 6. Eligibility Requirements, is revised to read:

To be eligible for fertility services, including IVF, the Veteran must have a service-connected condition that results in the inability to procreate without the use of fertility treatment, as defined above. *NOTE: For additional eligibility information, see appendix A.*

30. VHA Directive 1334, paragraph 7.c.(1), Practices and Procedures, is revised to read:

VA will cover costs of cryopreservation and storage at an independent community laboratory indefinitely up through the end of life of the eligible Veterans. Storage of cryopreserved gametes and embryos will take place at an independent facility in the community, per guidelines outlined in appendix A.

31. VHA Directive 1334, paragraph 7.c.(3), Practices and Procedures, is revised to read:

VA will pay the costs of cryopreservation and storage of cryopreserved oocytes, sperm and embryos indefinitely until the end of the life the eligible Veteran, or until the cryopreserved oocytes, sperm, or embryos are transferred to a third party (for any purpose outside this treatment program).

32. VHA Directive 1334, paragraph 7.e.(1), Practices and Procedures, is struck from the directive.

Gestational surrogacy, as defined in VHA Directive 1334, will remain outside the scope of VA IVF Services. Although the amended DoD Policy allows for a third-party gestational carrier in limited instances, Congress's authorization for VA to provide fertility counseling and treatment, including ART, is limited to providing these services to

a covered veteran and the spouse of a covered veteran. Therefore, VA may not provide IVF services to a person who is neither the covered veteran nor the spouse of a covered Veteran.

33. VHA Directive 1334, Appendix A, Eligibility Criteria, is revised to read:

1. To be eligible for In Vitro Fertilization (IVF) under 38 Code of Federal Regulations (CFR) 17.380, a Veteran must have a service-connected disability that results in the Veteran's inability to procreate without the use of fertility treatment.
2. Lawful spouses of eligible Veterans are eligible for fertility counseling and treatment under the program pursuant to 38 CFR 17.412.

34. VHA Directive 1334, Appendix B, In Vitro Fertilization Services, comparison table c is revised to strike:

1. "+ lawful eligible spouses" from the "Eligibility" line;
2. "naturally" from the "Service connection" line;
3. the entirety of the "Marital status" line;
4. the entirety of the "Couples" line;
5. "with opposite-sex gametes" from the "IUI" line;
6. "or an eligible Veteran's lawful divorce" from the "Time limits for cryopreservation of gametes" line;
7. "or an eligible Veteran's lawful divorce" from the "Cryopreservation for embryos" line: and
8. "or an eligible Veteran's lawful divorce" from the "Embryo storage paid by VA" line.

Additionally, the "no" from the "Donate sperm" line is revised to "Allowable but not paid for by VA (Veteran pays for non-Veteran sperm preparation or procedure to non-Veteran)."

35. In 38 CFR 17.380, the term “a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment” is interpreted to include: for a female veteran without ovarian function and/or patent uterine cavity, a service-connected injury or illness that prevents the successful fertilization of an egg by sperm, to include the service-connected loss of ovarian function and/or a patent uterine cavity.

Applicability

36. This Instruction applies to decisions to authorize benefits on or after the date of this Instruction, in which a veteran seeks fertility counseling or IVF services under 38 CFR 17.380 and 17.412.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on March 28, 2024, 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.