



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 (DoD) Office of General Counsel, DoD.

ACTION: Final rule.

SUMMARY: The DoD is finalizing amendments to apply offsets for payments made by the U.S. Government for medical malpractice claims to potential economic damages only and not to total potential damages. Under this rule total potential damages will no longer be 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. Instead, only economic damages will be reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or the VA for the same harm that is the subject of the medical malpractice claim. This rule also clarifies future lost earnings may be awarded until the time DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment; in cases of permanent incapacitation, until expiration of the claimant's work-life expectancy; or, in cases of death, until the expiration of the claimant's work-life expectancy, after deducting for the claimant's personal consumption.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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). Proposed amendments to this regulation were published in the Federal Register on October 20, 2023 (88 FR 72412), that proposed to apply offsets for payments made by the U.S. Government to economic damages only and clarify when future lost earnings may be awarded. Comments were accepted for 60 days until December 19, 2023. DoD is making no changes to the regulatory text based on the comments received.

II. Discussion of Comments and Changes

A total of 24 comments were posted on the regulatory docket. Summaries of the comments and the Department's responses are as follows.

General

Two comments from individual members of the public reflected general support for the proposed changes. One of these commenters stated that the proposed changes would benefit Service members and reduce the financial burdens on them and their families following injury or death.

One comment was too general to be actionable. The commenter generally sought to have a fair, efficient, and consistent system without making any suggestions for changes to the proposed rule.

The Department received a number of comments that were outside of the scope of the proposed rule and therefore did not result in changes to the proposed rule. Several comments expressed concerns about the quality of care provided by DoD or the VA and included personal narratives from Service members, their family members, or others on Service members' behalf

about specific medical care the Service members received from DoD and VA medical providers. One comment sought to have 32 CFR part 45 extended to all patients of DoD's military health system and not just members of the uniformed services. Another commenter sought to have the doctrine in *Feres v. United States*, a 1950 Supreme Court decision, overturned to allow Service members to bring lawsuits in Federal court. An individual submitted comments seeking a change related to the definition of "DoD health care provider" in 32 CFR part 45. An additional comment beyond the scope of the regulation recommended that Service members receive copies of their DD Form 2807-1, "Report of Medical History," and their DD Form 2807-2, "Accessions Medical History Report," in addition to their DD Form 214, "Certificate of Uniformed Service." One comment suggested that Service members be educated about the claims process. Finally, one individual generally expressed concerns about the claims process, including a belief that settlements under the process were unfair and lacked transparency.

Section 45.9 Calculation of damages: economic damages

Comment: A State legislator supported the portions of the proposed rule clarifying when future lost wages may be awarded.

Response: This comment did not recommend any changes to § 45.9 and no changes were made to this section.

Section 45.10 Calculation of damages: non-economic damages

Comment: One individual commented that the rule change may provide additional compensation for non-economic harms, although noted that compensation could never make a malpractice victim or survivor whole. A number of comments, including comments from Members of Congress, a local elected official, a State legislator, and individuals sought elimination of the cap on non-economic damages.

Response: DoD did not make any changes as a result of these comments. Section 2733a(g)(2)(B) of title 10, U.S.C., requires DoD to adjudicate claims, including calculating damages, based on uniform national standards consistent with generally accepted standards used

in a majority of States in adjudicating claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, without regard to the place where the Service member received medical care. This standard in 10 U.S.C. 2733a(g)(2)(B) is a different standard from the FTCA. Under the FTCA, 28 U.S.C. 2672 and 1346(b)(1), the law applied is the law of the place where the medical care was provided. A majority of States, 28, have caps on non-economic damages applicable in medical malpractice claims and therefore DoD has retained the cap on non-economic damages.

DoD administratively removed a description of “physical disfigurement” that used outdated terminology and is unnecessary for purposes of claims adjudication.

Section 45.11 Calculation of damages: offsets for DoD and VA compensation

Comment: One commenter, a city elected official, was supportive of eliminating offsets from non-economic damages. A State legislator indicated support for the changes that would allow more Service members to receive compensation for non-economic damages than under the current regulation. A number of comments, including from Members of Congress, a State legislator, and individuals, sought to eliminate offsets from the portion of potential malpractice damage awards for economic damages in addition to the portion for non-economic damages. Some comments incorrectly seemed to suggest that “offsets” meant that the Service member’s DoD and VA compensation would be reduced. Some comments also seemed to suggest, inaccurately, that the Department is offsetting an amount equal to all VA compensation for all line of duty injuries, not just offsetting the amount of compensation received for those additional injuries caused by malpractice.

Response: 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, 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 compensation system also applies to injuries incurred in service caused by medical malpractice.

Offsets from economic damages account for the fact that compensation has already been paid or will be paid by the Government for economic injuries caused by the malpractice. In other words, the claimant has already received, is receiving, or will be receiving compensation from the U.S. Government on account of his or her economic losses. For example, VA disability ratings "represent as far as can practically be determined the average impairment in earning capacity" resulting from service-related injuries. (*See* 38 CFR 4.1) DoD is required by 10 U.S.C. 2733a(g)(2)(B) to apply the law in the majority of states when adjudicating Service member medical malpractice claims. Offsetting economic damages for compensation already paid by the United States is consistent with general tort law principles that states would apply.

The fact that offsets are made from potential medical malpractice damages awards does not change a Service member's entitlement to the DoD or VA compensation. The same amount of DoD or VA compensation is still paid to a claimant even if the claimant receives an award of medical malpractice damages. What happens with offsets is that the applicable amount of DoD or VA compensation is subtracted from the medical malpractice damages award that otherwise would be payable.

Additionally, offsets are made only for the amount of compensation received from the DoD or VA that is related to the medical conditions caused by the malpractice. The amount of compensation for medical conditions unrelated to the malpractice is not offset. For example, if a Service member receives VA disability compensation both for a combat injury to her hand and for an injury to her knee caused by malpractice, only the amount of compensation for the knee injury would be used as an offset from the proposed damages award.

DoD did not make changes to this section.

III. Effective Date

Pursuant to 5 U.S.C. 553(d), DoD has decided not to delay the effective date of this rule and to make it effective immediately. The final rule relieves a restriction on the amount of non-economic damages claimants may receive. Moreover, there is good cause not to delay the effectiveness of this rule. The amendments apply to claims received by DoD on or after the date this final rule is published in the Federal Register and to claims pending before DoD on that date. An immediate effective date allows more timely adjudication of those claims currently pending which would be impacted by the final rule and more timely payments to those claimants. Further, delaying the effective date would result in no benefit to claimants because the final rule imposes no burdens on them and therefore they do not need time to prepare for compliance with the final rule.

IV. Regulatory Analysis

Executive Order 12866, “Regulatory Planning and Review,” as amended by Executive Order 14094, “Modernizing Regulatory Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 (as amended by Executive Order 14094) 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 final rule has been determined to be a significant regulatory action under paragraph 3(f) of the amended Executive Order 12866. Accordingly, it has been reviewed by the Office of Management and Budget as required by these Executive orders.

Congressional Review Act (5 U.S.C. 804(2))

This final rule is not a “major rule” as defined by 5 U.S.C. 804(2).

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 final 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 final 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 final 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 final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This final 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 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 final rule will not have a substantial effect on Indian tribal governments.

V. Impact of this Regulation

a. Summary

The amendments adjust and update certain portions of the regulation related to calculation of damages. Currently, DoD offsets from both economic and noneconomic damages compensation made by DoD and VA on account of the injuries from malpractice. The amendments apply offsets to economic damages only. Under the current rule, a claimant who has little or no economic damages would be unable to recover any damages if the compensation that the claimant already receives or will receive from DoD and VA for the injuries from malpractice exceeds the total amount of potential economic and non-economic damages. Under the amendment, these claimants will be able to recover non-economic damages because the amount of the DoD and VA compensation will no longer be used to offset the non-economic damages.

The amendments also include two changes that were made to better describe the applicable principles used when adjudicating claims to make the rule clearer for claimants. First, language was added to address medical rehabilitation as it relates to future lost earnings by explicitly stating the principle that future lost earnings do not continue beyond the point when DoD determines that the claimant is, or is expected to be, medically rehabilitated and able to resume employment. Second, because 10 U.S.C. 2733a(b)(5) prevents recovery for claims that are allowed to be settled and paid under any other provision of law, language was added to explicitly state that an injury or condition does not result in lost earnings for purposes of this regulation if the lost earnings stem from disability discrimination, since disability discrimination is compensable under other provisions of law. These principles, if applicable to the facts of a claim, already would have been applied in adjudicating those claims. Therefore, these changes will have no meaningful economic impact.

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 10 U.S.C. 2733a.

c. Costs

DoD does not estimate that any additional claims will be filed as a result of the amendments to the regulation. Since the enactment of 10 U.S.C. 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 amendments solely impact non-economic damages. No amendments are being made that impact offsets from economic damages.

Similar to malpractice claims under the FTCA, claims payable under this regulation could include a wide range of non-economic damages depending on their facts. A claim involving minor pain and temporary injuries would result in a lower non-economic damages award than a claim involving significant, continuing pain and/or debilitating injury. Initially, non-economic damages were capped at \$500,000. This cap was raised to \$600,000 in August 2022 and again to \$750,000 in October 2023.

Based on claims adjudicated under this part in 2021 and 2022, four claims were adjudicated in which offsets were applied. In two of these claims, the economic damages alone were larger than the offsets so the payouts would not have been impacted had the amendments been in effect. Only for the remaining two claims would the outcome have been different had the amendments been in effect. In one claim, an additional \$200,000 would have been paid to the claimant if offsets had not been made from non-economic damages. In the other claim, an additional \$100,000 would have been paid to the claimant if offsets had not been made from non-economic damages.

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 at 86 FR 32194 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 two claims 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 DoD has into account, DoD estimates that the amendments to the regulation will affect two claims per year. The average of the additional non-economic damages at issue in the two claims which would have been impacted if this regulation had been in effect was \$150,000. Assuming \$150,000 additional would be paid in two claims, the estimated total additional transfers from the Government to claimants therefore would be \$300,000. 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.

There could be significant variation in the number of claims that would be impacted by the amendments to the regulation from year to year. In some years, there could be no claims affected by the amendments, so there would be zero additional transfers from the Government to claimants. In other years, there could be more claims impacted by the amendments and/or claims involving different amounts of non-economic damages than the \$150,000 estimate. For example, assuming that in another year there were four claims in which non-economic damages would be paid and assuming the non-economic damages in these four claims would be paid at

the cap of \$750,000, this would lead to transfers of \$3 million from the Government to claimants.

e. Benefits

The amendments 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 amendments 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

Claims, Malpractice, Medical, Uniformed services.

Accordingly, the Department of Defense amends 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) For 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.

* * * * *

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

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

(d) * * * 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: May 6, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer,

Department of Defense.

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