



38 CFR Parts 3, 8 and 20

RIN 2900-AR32

Clarification of VA's Processing of Survivors Benefits Claims

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations concerning survivors benefits claims. With respect to claims processing, VA proposes to clarify that, if VA determines that a surviving spouse or child is eligible for dependency and indemnity compensation (DIC), VA would concurrently deny the co-existing claim for survivors pension, except where paying survivors pension would be more beneficial to the claimant, which would only be the case if the claimant is the veteran's surviving spouse and the claimant's application indicates that the claimant does not have any dependents, is currently in a nursing home, and has applied for or is currently receiving Medicaid. The intended effect of this rulemaking is to streamline and improve the timeliness of the adjudication of claims processing for VA survivors benefits while ensuring that claimants receive the greatest benefit allowed by law.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received:

<https://www.regulations.gov>. VA will not post on Regulations.gov public comments that

make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments; however, we will post comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking. In accordance with the Providing Accountability Through Transparency Act of 2023, a 100 word Plain-Language Summary of this proposed rule is available at Regulations.gov, under RIN-2900-AR32.

FOR FURTHER INFORMATION CONTACT: Eric Baltimore, Management and Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420; (202) 632-8863 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: A surviving spouse or child of a Veteran may apply for any of several survivors benefits including DIC, survivors pension, and/or accrued benefits. See 38 U.S.C. 5101(b)(1). VA is required to address and make a decision on each benefit, irrespective of claimant intent, whenever a surviving spouse or child submits a claim for DIC, survivors pension, and/or accrued benefits on VA Form 21P-534 or 21P-534EZ. This proposed rule would only address VA's processing of the survivors pension claims of surviving spouses and children whom VA has determined are eligible for DIC. VA is not proposing to change its processing of survivors pension claims in cases in which the claimant is ineligible for DIC. Nor is VA proposing to change its processing of accrued benefits claims.

DIC and survivors pension provide a basic rate of payment with increases where (1) the survivor is in need of regular aid and attendance, (2) the survivor is permanently housebound, or (3) the surviving spouse has custody of the veteran's minor child(ren), and, in each instance, the DIC rate exceeds the maximum annual pension rate.

Compare 38 U.S.C. 1311 (providing the DIC rates for surviving spouses) *and* 1313 (providing the DIC rates for children), *with* 38 U.S.C. 1541 (providing the survivors pension rates for surviving spouses) *and* 1542 (providing the survivors pension rates for children). Because DIC and survivors pension are not payable concurrently, 38 U.S.C. 1317(a), once VA finds the survivor eligible for DIC, specific factual findings with respect to survivors pension will not result in VA paying additional benefits to that survivor.

“VA possesses a duty not only to individual claimants, but to the effective functioning of the veterans [benefits] system as a whole.” *Veterans Justice Grp., LLC v. Sec’y of Veterans Affairs*, 818 F.3d 1336, 1354 (Fed. Cir. 2016). Recipients of VA’s survivors benefits – especially survivors pension – are some of VA’s most vulnerable beneficiaries. Most beneficiaries who receive survivors pension are elderly widows or widowers who just lost their spouse’s household income and have income below the maximum annual pension rate of \$11,102 (surviving spouse with no dependents effective December 1, 2023), established by Congress for entitlement to VA survivors pension. VA believes this population is best served by VA focusing its adjudication resources in the areas more likely to result in benefits flowing to survivors. To this end, VA proposes to amend 38 CFR 3.152 to specifically state the general rule that a grant of DIC would result in the automatic denial of survivors pension, to ensure that a surviving spouse or child would receive the greater benefit more quickly.

VA acknowledges its statutory obligation to “decide all questions of law and fact necessary to a decision by [VA] under a law that affects the provision of benefits by [VA] to veterans or the dependents or survivors of veterans.” 38 U.S.C. 511(a). A “decision” either grants or denies the benefit sought. *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000). With respect to claims for DIC and survivors pension, Congress has provided a general rule of decision by statute, stating that no person eligible for DIC shall be eligible for survivors pension. 38 U.S.C. 1316(b), 1317(a). Therefore, once VA

finds eligibility for DIC, there are no additional findings of law or fact necessary to decide the claim for survivors pension. The survivor's eligibility for DIC itself precludes eligibility for survivors pension. VA proposes to amend §§ 3.5(c) and 3.152(b)(1) to clarify this point.

VA also recognizes that Congress has enacted an exception to the rule provided in 38 U.S.C. 1317(a), permitting a surviving spouse who is eligible for DIC to nonetheless receive survivors pension in certain circumstances. 38 U.S.C. 1317(b). VA proposes to amend §§ 3.5 and 3.152 to account for this exception as well. For context, 38 U.S.C. 1317(a) states, in relevant part, "[e]xcept as provided in subsection (b), no person eligible for [DIC] by reason of any death occurring after December 31, 1956, shall be eligible by reason of such death for any payments under . . . provisions of law administered by the Secretary providing for the payment of . . . death pension." Because survivors pension is only payable to surviving spouses and children of wartime veterans, this restriction on payment of survivors pension to someone eligible for DIC only affects those individuals. The exception states that "[a] surviving spouse who is eligible for [DIC] may elect to receive death pension instead of such compensation." 38 U.S.C. 1317(b). When considered in isolation, subsection (b) appears to create an unfettered right of election for surviving spouses, which would mean that the general rule only applies to children. Yet, of the 259,462 surviving spouses and children receiving DIC at the time the exception was enacted, less than nine percent were children. More than 91 percent were surviving spouses. Because "it is hard to even imagine a rational statutory exception that is intentionally designed to swallow the rule," *AFGE v. Trump*, 318 F. Supp. 3d 370, 434 (D.D.C. 2018), *vacated on other grounds by* 929 F.3d 748, 761 (D.C. Cir. 2019)), "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, [courts] usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*,

489 U.S. 726, 739 (1989) (citing *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

Therefore, we turn to legislative history for further insight into congressional intent. See *Reid v. Department of Commerce*, 793 F.2d 277, 282 (Fed. Cir. 1986) (“resort[ing] to legislative history to ascertain the intent of Congress” when “a literal reading of the statute” “would lead to a result at variance with the policy of the legislation as a whole”).

The legislative history discusses a surviving spouse’s election of survivors pension solely in terms of cost savings for the Federal Government. See Public Law 103-446, sec. 111 (captioned “Cost-Savings Provisions”). As stated previously, the applicable DIC rate always exceeds the maximum annual pension rate. Therefore, looking only at the monthly benefit payments, the default rule that a person eligible for the greater benefit is ineligible for the lesser benefit would increase costs. From that perspective, it would appear that permitting any surviving spouse to elect the lesser benefit would yield the most cost savings. However, VA’s costs are not limited to benefit payments. VA also incurs adjudication-related costs. The default rule in section 1317(a) reduces adjudication costs because VA only has to adjudicate entitlement to the lesser benefit if the claimant is ineligible for the greater benefit. Cost savings can only be realized through an election provision if enough claimants actually elect the lesser benefit that the aggregate reduction in benefit payments actually exceeds the additional administrative costs associated with the adjudication of entitlement to the lesser benefit.

Yet, the Court of Appeals for Veterans Claims has recognized the high improbability that a claimant would intentionally seek less than the maximum benefit. *AB v. Brown*, 6 Vet. App. 35, 38 (1993) (“the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation”). Further, it is very unlikely that Congress established section 1317(b) for the purpose of allowing claimants to elect the lesser benefits where doing so is contrary to their own interests.

Nonetheless, the legislative history does identify one situation in which the payment of survivors pension would result in more funds actually ending up in the hands of the claimant, while at the same time yielding cost savings to the Federal government: if a surviving spouse who has no dependents is receiving nursing home care paid for by a joint Federal and state program known as Medicaid. If an individual does not have dependents, Medicaid will not pay for the individual's nursing home care unless all of the individual's income is first used toward the nursing home costs. As a result, if VA pension constitutes countable income for Medicaid purposes, the VA pension program is essentially paying for nursing home care that would otherwise be paid for by Medicaid. Recognizing this, in 1990, Congress enacted a provision providing pension payments at \$90.00 per month for Veterans who have no dependents and are receiving nursing home care at Medicaid expense. H.R. Rep. No. 101-964, at 982-83 (1990). Congress also made clear that the \$90.00 per month was not countable income for Medicaid purposes, which provided an incentive for Veterans to elect the pension benefit.

In 1992, Congress extended the same policy to surviving spouses. Veterans Benefits Act of 1992, Public Law 102-568, sec. 601(a). However, the statutory bar in 38 U.S.C. 1317(a) against eligibility for survivors pension when an individual was eligible for DIC limited the cost savings to the Federal Government, because it required VA to pay DIC rather than the protected pension benefit. To address this, in 1994, Congress enacted 38 U.S.C. 1317(b) as a cost-saving measure, enabling surviving spouses to elect survivors pension in lieu of DIC. H.R. Rep. No. 103-669, at 11. A surviving spouse who has no dependents and requires nursing home care and who receives DIC would have to use all the DIC for nursing home care costs before Medicaid coverage would apply. A surviving spouse requiring nursing home care may, instead, choose to elect survivors pension to receive \$90.00 per month, which is not countable income for

Medicaid purposes, in addition to receiving Medicaid coverage. As a result, the surviving spouse's nursing home care costs would be covered more by Medicaid and less by VA and the Federal Government.

VA acknowledges that the text of section 1317(b) is not expressly limited to the circumstance involving a surviving spouse who has no dependents and requires nursing home care paid by Medicaid or with an application pending with Medicaid for such care. However, the only fact pattern addressed in legislative history materials produced during the conference report stage was that involving surviving spouses who do not have any dependents and who are receiving nursing home care paid by Medicaid, see H.R. Rep. No. 103-669 at 11; see 140 Cong. Rec. 11355 (daily ed. Oct. 7, 1994) (joint explanatory statement) ("This would permit surviving spouses who are in Medicaid-covered nursing homes and who receive DIC to elect to receive death pension, in order to be able to retain \$90 of their monthly benefits"). "The conference report stage is closest to final passage and is generally thus the best indicator of legislative meaning apart from the statute itself." *Disabled in Action of Metro. New York v. Hammons*, 202 F.3d 110, 125 (2d Cir. 2000).

Moreover, VA is unaware of a comparable fact pattern in which a lesser VA benefit may result in a greater aggregate recovery for a claimant. As noted above, Congress established in section 1317(a) a general rule that entitlement to DIC precludes entitlement to survivors pension, and the exception in section 1317(b) was enacted to address a narrow situation, in which the exception serves both to maximize VA payments to the claimant and to limit Federal expenditures that would otherwise be diverted to third parties. VA believes that applying the exception only to those cases involving a surviving spouse who has no dependents and requires nursing home care paid by Medicaid or with an application pending Medicare for such care best balances the goals of section 1317(a) and (b), and best serves VA claimants by avoiding the

unnecessary case-specific and systemic delays and the Federal expenditures that would result from developing and deciding pension claims that would not maximize VA benefits to claimants.

Therefore, VA interprets section 1317(b) as applying only in the circumstance involving a surviving spouse who has no dependents and requires nursing home care paid by Medicaid or with an application pending with Medicaid for such care. Because survivors pension would be the better benefit for the surviving spouse when a surviving spouse with no dependents is receiving nursing home care paid by Medicaid, VA would automatically grant survivors pension, provide a formal rating decision denying DIC, and inform the surviving spouse why VA is granting survivors pension. If VA grants a surviving spouse survivors pension in lieu of DIC as the more advantageous benefit, the surviving spouse is not barred from reapplying for and receiving DIC in the event the surviving spouse becomes ineligible for survivors pension at the rate provided for in 38 U.S.C. 5503(d). In that circumstance, if the surviving spouse's application were received within one year of the date on which Medicaid-covered nursing home care ended, VA would deem the application to have been received on the date that Medicaid covered nursing home care ended and DIC benefits would be effective as of the calendar month after Medicaid-covered nursing home care ended. Otherwise, DIC benefits would not be effective earlier than the date VA receives the claim. Similarly, if a surviving spouse who, but for receipt of DIC, would be eligible for survivors pension begins receiving Medicaid-covered nursing home care, the surviving spouse would not be barred from reapplying for and receiving survivors pension at the rate provided for in section 5503(d). In that circumstance, the effective date of survivors pension would be based on the date of claim for survivors pension and the date DIC payments were discontinued. VA proposes to amend §§ 3.402 and 3.502(f) to address this change.

Furthermore, it is not VA's intent to eliminate a survivor's opportunity to claim more than one benefit on a single form – rather it is to reduce the administrative burden for both VA and the claimant and to expedite the delivery of benefits to survivors. If VA determines that the claimant is the veteran's surviving spouse or child, but that the veteran's death does not entitle the veteran's survivor to DIC, see 38 U.S.C. 1310, 1318, VA will decide the additional questions of fact or law necessary to grant or deny survivors pension. Similarly, where VA determines that the claimant is the veteran's surviving spouse and the veteran's death entitles the veteran's survivors to DIC, VA will determine whether, but for DIC entitlement, the surviving spouse would be entitled to survivors pension at the rate provided for in 38 U.S.C. 5503(d). In addition, in all cases, VA will provide notice of its decision with respect to DIC and survivors pension in accordance with 38 U.S.C. 5104, including any favorable findings that were necessary to those decisions and provide such decision notification in writing to the claimant and his or her representative, if applicable.

Therefore, VA proposes to amend §§ 3.5(c), 3.152(b)(1) and 3.702(d)(2) to clarify VA's authority to pay the higher or better benefit between DIC and survivors pension. The intended effect of this amendment is to streamline and improve the timeliness of the adjudication of claims processing for VA survivor benefits and deliver decisions on claimed benefits and services more timely to beneficiaries in need and during a difficult time.

VA also proposes to replace the term "death pension" with the term "survivors pension" each place it appears in VA's implementing regulations. This will ensure that the language of VA's implementing regulations aligns with current usage. Also, VA proposes to replace the words "or compensation" with "or death compensation" each place they appear in VA's implementing regulations.

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 and Executive Order 13563. 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.

Paperwork Reduction Act

Although this proposed rule contains collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collection of information. The collection of information for § 3.152 is currently approved by the Office of Management and Budget and has been assigned OMB control number 2900-0004.

VA's proposed changes would not result in a reduction of an information collection burden. A surviving spouse or child applies for both DIC and survivors pension using a single form. While some of the information solicited by the form is pertinent to either benefit (e.g., the claimant's relationship to the veteran and information

regarding the veteran's service), other information is specific to one benefit (e.g., income and asset information with respect to survivor's pension). Pursuant to this rulemaking, if VA grants DIC to a surviving spouse who is not eligible for the exception under 38 U.S.C. 1317(b), or to a child, VA would be able to adjudicate the application for survivors pension without making specific factual findings regarding income and net worth because the claimant's entitlement to DIC would itself be a bar to entitlement to survivor's pension. Conversely, if VA denies DIC or if the surviving spouse had potential eligibility for the exception under 38 U.S.C. 1317(b), VA would have a legal obligation to solicit income and net worth information from the claimant. *Isenhardt v. Derwinski*, 3 Vet. App. 177, 179–80 (1992). Yet, whether that information would be necessary to the adjudication of the application would only be known after VA makes a determination regarding eligibility for DIC. Considering VA's duties to individual claimants as well as the functions of the benefits system as a whole, VA believes that continuing to collect information pertinent to survivors pension entitlement at the time a surviving spouse or child applies for DIC would promote streamlined claims processing and reduce the likelihood that claimants would be subject to multiple, separate requests for information.

Regulatory Flexibility Act

The Secretary certifies that this proposed rule would 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. There are no small entities involved with the process and/or benefits associated with this rulemaking. 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 proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

38 CFR Part 8

Life insurance, Military personnel, Veterans.

38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on March 1, 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.

Michael P. Shores,

Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR chapter 1 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 § 3.5 by revising paragraph (c) to read as follows:

§ 3.5 Dependency and indemnity compensation.

* * * * *

(c) *Exclusiveness of remedy.* (1) Except as provided in paragraph (c)(2) of this section, no person eligible for dependency and indemnity compensation by reason of a death occurring on or after January 1, 1957, shall be eligible by reason of such death for survivors pension or death compensation under any other law administered by the Department of Veterans Affairs.

(2) A surviving spouse who, but for the surviving spouse's eligibility for dependency and indemnity compensation, would be eligible to receive survivors pension at the rate provided for in 38 U.S.C. 5503(d) will receive survivors pension instead of such compensation.

(Authority: 38 U.S.C. 1317)

* * * * *

3. Amend § 3.152 by:

- a. Redesignating paragraph (b)(1) as paragraph (b)(1)(i); and
- b. Adding paragraph (b)(1)(ii).

The addition reads as follows:

§ 3.152 Claims for death benefits.

* * * * *

(b)(1)(i) * * *

(ii)(A) Except as provided in paragraph (b)(1)(ii)(B) of this section, an award of dependency and indemnity compensation to a surviving spouse or child will result in the denial of survivors pension.

(B) With respect to a claim by a surviving spouse, if the evidence establishes that, but for the surviving spouse's eligibility for dependency and indemnity compensation, the surviving spouse would be eligible to receive survivors pension at the rate provided for in 38 U.S.C. 5503(d), survivors pension will be paid instead of such compensation.

(Authority: 38 U.S.C. 1317)

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4. Amend § 3.402 by adding paragraph (d) to read as follows:

§ 3.402 Surviving spouse.

* * * * *

(d) *Medicaid-covered nursing home care.* (1) If a surviving spouse described in § 3.152(b)(1)(ii)(B) stops receiving Medicaid-covered nursing home care, dependency and indemnity compensation, if otherwise in order, will be effective as of the date Medicaid coverage ceased, if a claim for dependency and indemnity compensation is received within one year of the date Medicaid coverage ceased; otherwise, it will be effective as of the date of receipt of claim or date entitlement arose, whichever is later.

(2) If a surviving spouse who is receiving dependency and indemnity compensation and who, but for eligibility for dependency and indemnity compensation, would be eligible for survivors pension, begins receiving Medicaid-covered nursing home care, survivors pension will be effective as of the first day of the month after

dependency and indemnity compensation was discontinued, if a claim for survivors pension is received within one year of the date dependency and indemnity compensation was discontinued; otherwise, it will be effective as of the date of receipt of claim or date entitlement arose, whichever is later.

5. Amend § 3.502 by revising the paragraph heading of paragraph (f) to read as follows:

§ 3.502 Surviving spouses.

* * * * *

*(f) Medicaid-covered nursing home care. * * **

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§ 3.658 [Amended]

5. Amend § 3.658 by, in paragraph (b), removing the words “or compensation” and adding, in their place, the words “or death compensation”.

6. Amend § 3.702 by revising paragraph (d) to read as follows:

§ 3.702 Dependency and indemnity compensation.

* * * * *

(d)(1) Except as noted in paragraphs (d)(2) and (g) of this section, an election to receive dependency and indemnity compensation in lieu of death compensation is final, and the claimant may not thereafter reelect death compensation in that case. An election is final when the payee (or the payee’s fiduciary) has negotiated one check for this benefit or when the payee dies after filing an election but prior to negotiation of a check.

(2) A surviving spouse’s receipt of survivors pension at the rate provided for in 38 U.S.C. 5503(d) in lieu of dependency and indemnity compensation will not be a bar to the surviving spouse’s receipt of such compensation in the event the surviving spouse becomes ineligible for survivors pension at the rate provided for in 38 U.S.C. 5503(d).

* * * * *

7. Amend part 3, by removing the words “death pension”, wherever it appears, and adding, in their place, the words “survivors pension”.

PART 8—NATIONAL SERVICE LIFE INSURANCE

8. The authority citation for part 8 continues to read as follows:

Authority: 38 U.S.C. 501, 1901-1929, 1981-1988, unless otherwise noted.

§ 8.4 [Amended]

9. Amend § 8.4, in the introductory text and paragraph (b), by removing the words “death pension” and adding, in their place, the words “survivors pension”.

PART 20—BOARD OF VETERANS’ APPEALS: RULES OF PRACTICE

10. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

§ 20.104 [Amended]

11. Amend § 20.104, in paragraph (a)(4), by removing the words “death pension” and adding, in their place, the words “survivors pension”.

[FR Doc. 2024-04895 Filed: 3/8/2024 8:45 am; Publication Date: 3/11/2024]