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Title 38, Part 3

*Adjudication*

**Veterans Benefits Administration**

Supplement No. 110

Covering period of *Federal Register* issues  
through October 1, 2014

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# GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

## Supplemental Materials for *Book B*

Code of Federal Regulations

Title 38, Part 3

*Adjudication*

## Veterans Benefits Administration

Supplement No. 110

5 October 2014

Covering the period of Federal Register issues  
through October 1, 2014

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<b>FILING INSTRUCTIONS</b>
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**Book B, Supplement No. 110  
October 5, 2014**

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
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3.1000-1 to 3.1000-2	3.1000-1 to 3.1000-2	§3.1000
3.1008-1 to 3.1009-1	3.1008-1 to 3.1010-4	§3.1010

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## HIGHLIGHTS

### Book B, Supplement No. 110 October 5, 2014

**Note:** Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

**Supplement frequency:** This Book B (*Adjudication*) was originally supplemented four times a year, in February, May, August, and November. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

### Modifications in this supplement include the following:

1. On 5 September 2014, the VA published a final rule effective 6 October 2014, to amend its regulations on adjudication of VA benefit claims, representation of claimants, and the Board of Veterans' Appeals rules of practice. Specifically, these amendments implement section 212 of the Veterans' Benefits Improvement Act of 2008, which allows an eligible survivor to substitute for a deceased claimant in the decedent's pending claim or appeal of a decision on a claim. Changes:

- Added §3.1010.

2. On 12 September 2014, the VA published a final rule effective that same day, to amend its adjudication regulations regarding special home adaptation grants for members of the Armed Forces and veterans with certain vision impairment. Changes:

- In §3.809a, revised paragraph (b).



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A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, on or after October 28, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 2101(b) or 2101A(a) may be issued to a veteran who served after April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section on or after December 16, 2003, if the following requirements are met:

(a) The member of the Armed Forces serving on active duty or veteran is not entitled to a certificate of eligibility for assistance in acquiring specially adapted housing under §3.809 nor had the member of the Armed Forces serving on active duty or veteran previously received assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a). A member of the Armed Forces serving on active duty or veteran who first establishes entitlement under this section and who later becomes eligible for a certificate of eligibility under §3.809 may be issued a certificate of eligibility under §3.809.

(b) A member of the Armed Forces serving on active duty must have a disability that was incurred or aggravated in line of duty in active military, naval, or air service and meets the requirements described in either paragraph (b)(1) or (b)(2) of this section. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability that meets the requirements described in either paragraph (b)(1) or (b)(2) of this section.

(1) VA has rated the disability as permanently and totally disabling and it:

(i) Includes the anatomical loss or loss of use of both hands;

(ii) Is due to deep partial thickness burns that have resulted in contracture(s) with limitation of motion of two or more extremities or of at least one extremity and the trunk;

(iii) Is due to full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk; or

(iv) Is due to residuals of an inhalation injury (including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease).

(2) The disability is due to blindness in both eyes, having central visual acuity of 20/200 or less in the better eye with the use of a standard correcting lens. For the purposes of this paragraph, an eye with a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less. The disability discussed in this paragraph need not be rated as permanently and totally disabling.

Cross-Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§36.4400 through 36.4410 of this chapter.

[46 FR 47543, Sept. 29, 1981, as amended at 53 FR 23237, June 21, 1988; 75 FR 57861, Sept. 23, 2010; 79 FR 54609, Sep. 12, 2014]

**Supplement *Highlights* references:** 93(1), 110(2)

*Next Section is §3.810*

[Reserved]

Accrued

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§3.1000 Entitlement under 38 U.S.C. 5121 to benefits due and unpaid upon death of a beneficiary.

(a) *Basic entitlement.* Except as provided in §§3.1001 and 3.1008, where death occurred on or after December 1, 1962, periodic monetary benefits (other than insurance and servicemembers’ indemnity) authorized under laws administered by the Department of Veterans Affairs, to which a payee was entitled at his or her death under existing ratings or decisions or those based on evidence in the file at date of death, and due and unpaid will, upon the death of such person, be paid as follows: (Authority: 38 U.S.C. 5121(a))

(1) Upon the death of a veteran to the living person first listed as follows:

- (i) His or her spouse;
- (ii) His or her children (in equal shares);
- (iii) His or her dependent parents (in equal shares) or the surviving parent.

(2) Upon the death of a surviving spouse or remarried surviving spouse, to the veteran’s children.

(3) Upon the death of a child, to the surviving children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation.

(4) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.

(5) In all other cases, only so much of the accrued benefit may be paid as may be necessary to reimburse the person who bore the expense of last sickness or burial. (See §3.1002.)

(b) *Apportionments.*

(1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such unpaid amount is payable to the veteran or to any other dependent or dependents of the veteran. (Authority: 38 U.S.C. 5121(a)(1))

(2) Where at the date of death of the veteran an apportioned share is being paid to or has been withheld on behalf of another person, the apportioned amount remaining unpaid for periods prior to the last day of the month before the veteran's death is payable to the apportionee.

(3) Where the accrued death pension, compensation or dependency and indemnity compensation was payable for a child as an apportioned share of the surviving spouse's benefit, payment will be made under the provisions of paragraph (a)(4) of this section, on the expenses of such deceased child's last sickness or burial.

(c) *Claims and evidence.* Application for accrued benefits must be filed within 1 year after the date of death. A claim for death pension, compensation, or dependency and indemnity compensation, by an apportionee, surviving spouse, child or parent is deemed to include claim for any accrued benefits. (See §3.152(b)).

(1) If an application for accrued benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of eligible persons under the provisions of paragraphs (a)(1) through (a)(4) or paragraph (b) of this section and that circumstances exist which make the claimant the specific person entitled to payment of all or part of any benefits which may have accrued, VA shall notify the claimant:

(i) Of the type of information required to complete the application;

(ii) That VA will take no further action on the claim unless VA receives the required information; and

(iii) That if VA does not receive the required information within 1 year of the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to another or others in the class. (Authority: 38 U.S.C. 5121(c); 5112(b))

(d) *Definitions.*

(1) "Spouse" means the surviving spouse of the veteran, whose marriage meets the requirements of §3.1(j) or §3.52. Where the marriage meets the requirements of §3.1(j) date of marriage and continuous cohabitation are not factors.

(2) "Child" is as defined in §3.57 and includes an unmarried child who became permanently incapable of selfsupport prior to attaining 18 years of age as well as an unmarried child over the age of 18 but not over 23 years of age, who was pursuing a course of instruction within the meaning of §3.57 at the time of the payee's death. However, upon the death of a child

**§3.1008 Accrued benefits payable to foreign beneficiaries.**

In case of death of the payee of any check in payment of periodic monetary benefits (other than insurance and servicemembers' indemnity) accruing under laws administered by the Department of Veterans Affairs, while the amount thereof remains in the special deposit account established by Pub. L. 828, 76th Congress, such amount will be payable under section 3 of that act. (31 U.S.C. 125) However the accrued amount will be payable only if the person on whose behalf checks were issued and the person claiming the accrued amount have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.

[26 PR 1609, Feb. 24, 1961, as amended at 62 FR 35970, July 3, 1997]

**§3.1009 Personal funds of patients.**

The provisions of this section are applicable to gratuitous benefits deposited by the Department of Veterans Affairs either before, on, or after December 1, 1959, in a personal funds of patients account for an incompetent veteran who was incompetent at the date of death. Where the veteran died after November 30, 1959:

(a) *Eligible persons.* Gratuitous benefits shall be paid to the living person first listed as follows:

(1) His or her spouse, as defined in §3.1000(d)(1);

(2) His or her children (in equal shares), as defined in §3.57 but without regard to their age or marital status;

(3) His or her dependent parents (in equal shares) as defined in §3.59 or the surviving parent, provided that the parent was dependent within the meaning of §3.250 at the date of the veteran's death.

(4) In all other cases, only so much may be paid as may be necessary to reimburse a person who bore the expense of last sickness or burial. (See §3.1002.) (Authority: 38 U.S.C. 5502(d))

(b) *Claim.* Application must be filed with the Department of Veterans Affairs within 5 years after the death of the veteran. If, however, any person otherwise entitled is under legal disability at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(1) There is no time limit for the submission of evidence.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to another or others in the class.

[27 FR 5539, June 12, 1962, as amended at 28 FR 10487, Sept. 28, 1963; 39 FR 30349, Aug. 22, 1974]

*Next Section is §3.1010*

**§3.1010 Substitution under 38 U.S.C. 5121A following death of a claimant**

(a) *Eligibility.* If a claimant dies on or after October 10, 2008, a person eligible for accrued benefits under §3.1000(a) listed in 38 CFR 3.1000(a)(1) through (5) may, in priority order, request to substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, that was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. Upon VA's grant of a request to substitute, the substitute may continue the claim or appeal on behalf of the deceased claimant for purposes of processing the claim or appeal to completion. Any benefits ultimately awarded are payable to the substitute and other members of a joint class, if any, in equal shares.

(b) *Time and place for filing a request.* A person may not substitute for a deceased claimant under this section unless the person files a request to substitute with the agency of original jurisdiction no later than one year after the claimant's death.

(c) *Request format.*

(1) A request to substitute must be submitted in writing. At a minimum, a request to substitute must indicate intent to substitute; include the deceased claimant's claim number, Social Security number, or appeal number; and include the names of the deceased claimant and the person requesting to substitute.

(2) In lieu of a specific request to substitute, a claim for accrued benefits, survivors pension, or dependency and indemnity compensation by an eligible person listed in §3.1000(a)(1) through (5) is deemed to include a request to substitute if a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. A claimant for accrued benefits, survivors pension, or dependency and indemnity compensation may waive the right to substitute in writing over the claimant's signature.

(d) *Evidence of eligibility.* A person filing a request to substitute must provide evidence of eligibility to substitute. Evidence of eligibility to substitute means evidence demonstrating that the person is among those listed in the categories of eligible persons in §3.1000(a)(1) through (5) and first in priority order. If a person's request to substitute does not include evidence of eligibility when it is originally submitted and the person may be an eligible person, the Secretary will notify the person—

(1) Of the evidence of eligibility required to complete the request to substitute;

(2) That VA will take no further action on the request to substitute unless VA receives the evidence of eligibility; and

(3) That VA must receive the evidence of eligibility no later than 60 days after the date of notification or one year after the claimant's death, whichever is later, or VA will deny the request to substitute.

(e) *Decisions on substitution requests.* Subject to the provisions of §20.1302 of this chapter, the agency of original jurisdiction will decide in the first instance all requests to substitute, including any request to substitute in an appeal pending before the Board of Veterans' Appeals.

(1) *Notification.* The agency of original jurisdiction will provide written notification of the granting or denial of a request to substitute to the person who filed the request, together with notice in accordance with § 3.103(b)(1).

(2) *Appeals.* The denial of a request to substitute may be appealed to the Board of Veterans' Appeals pursuant to 38 U.S.C. 7104(a) and 7105.

(3) *Joint class representative.*

(i) A *joint class* means a group of two or more persons eligible to substitute under the same priority group under §3.1000(a)(1) through (a)(5), e.g., two or more surviving children.

(ii) In the case of a joint class of potential substitutes, only one person of the joint class may be a substitute at any one time. The first eligible person in the joint class to file a request to substitute will be the substitute representing the joint class.

(f) *Adjudications involving a substitute.* The following provisions apply with respect to a claim or appeal in which a survivor has been substituted for the deceased claimant:

(1) *Notice under §3.159.* VA will send notice under §3.159(b), "Department of Veterans Affairs assistance in developing claims," to the substitute only if the required notice was not sent to the deceased claimant or if the notice sent to the deceased claimant was inadequate.

(2) *Expansion of the claim not permitted.* A substitute may not add an issue to or expand the claim. However, a substitute may raise new theories of entitlement in support of the claim.

(3) *Submission of evidence and other rights.* A substitute has the same rights regarding hearings, representation, appeals, and the submission of evidence as would have applied to the claimant had the claimant not died. However, rights that may have applied to the claimant prior to death but which cannot practically apply to a substitute, such as the right to a medical examination, are not available to the substitute. The substitute must complete any action required by law or regulation within the time period remaining for the claimant to take such action on the date of his or her death. The time remaining to take such action will start to run on the date of the mailing of the decision granting the substitution request.

(4) *Board of Veterans' Appeals procedures.* The rules and procedures governing appeals involving substitutes before the Board of Veterans' Appeals are found in parts 19 and 20 of this chapter.

(g) *Limitations on substitution.* The following limitations apply with respect to substitution:

(1) *A claim or appeal must be pending.*

(i) A claim is considered to be pending if the claimant had filed the claim with an agency of original jurisdiction but dies before the agency of original jurisdiction makes a decision on the claim. A claim is also considered to be pending if, at the time of the claimant's death, the agency of original jurisdiction has made a decision on the claim, but the claimant has not filed a notice of disagreement, and the period allowed by law for filing a notice of disagreement has not expired.

(ii) An appeal is considered to be pending if a claimant filed a notice of disagreement in response to a notification from an agency of original jurisdiction of its decision on a claim, but dies before the Board of Veterans' Appeals issues a final decision on the appeal. If the Board issued a final decision on an appeal prior to the claimant's death, the appeal is not pending before VA for purposes of this section, even if the 120-day period for appealing the Board's decision to the Court of Appeals for Veterans Claims has not yet expired.

(2) *Benefits awarded.* Any benefits ultimately awarded are limited to any past-due benefits for the time period between the effective date of the award and what would have been the effective date of discontinuance of the award as a result of the claimant's death.

(3) *Benefits for last sickness and burial only.* When substitution cannot be established under any of the categories listed in §3.1000(a)(1) through (a)(4), only so much of any benefits ultimately awarded may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial. No part of any benefits ultimately awarded shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any claimant.

(4) *Substitution by subordinate members prohibited.* Failure to timely file a request to substitute, or a waiver of the right to request substitution, by a person of a preferred category of eligible person will not serve to vest the right to request substitution in a person in a lower category or a person who bore the expense of last sickness and burial; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to other persons in the class.

(5) *Death of a substitute.* If a substitute dies while a claim or appeal is pending before an agency of original jurisdiction, or an appeal of a decision on a claim is pending before the Board, another member of the same joint class or a member of the next preferred subordinate category listed in §3.1000(a)(1) through (5) may substitute for the deceased substitute but only if the person requesting the successive substitution files a request to substitute no later than one year after the date of the substitute's death (not the date of the claimant's death).

(Authority: 38 U.S.C. 5121, 5121A)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0740)

[79 FR 52982, Sep. 5, 2014]

*Next Section is §3.1700*