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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 103

Covering period of *Federal Register* issues
through August 1, 2012

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Custom Federal Regulations Service™

Supplemental Materials for *Book B*

Code of Federal Regulations

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 103

5 August 2012

Covering the period of Federal Register issues
through August 1, 2012

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B103-3

**To ensure accuracy and timeliness of your materials,
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1. Always file your supplemental materials immediately upon receipt.
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FILING INSTRUCTIONS

Book B, Supplement No. 103

August 5, 2012

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
3.10-1 to 3.10-4	3.10-1 to 3.10-4	§3.10
3.21-2 to 3.22-3	3.21-2 to 3.22-3	§3.22

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HIGHLIGHTS

Book B, Supplement No. 103 August 5, 2012

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 10 July 2012, the VA published a final rule effective that same day, amending its adjudication regulation regarding the additional statutory amount of Dependency and Indemnity Compensation (DIC) payable to a surviving spouse with one or more children below the age of 18. Change:

- In §3.10, revised paragraph (e)(4).

2. On 10 July 2012, the VA published a final rule effective that same day, amending its adjudication regulation regarding benefits for survivors of former prisoners of war who were rated totally disabled at the time of death. Change:

- In §3.22, revised paragraph (a)(2)(iii).



§3.10 Dependency and indemnity compensation rate for a surviving spouse.

(a) *General determination of rate.* When VA grants a surviving spouse entitlement to DIC, VA will determine the rate of the benefit it will award. The rate of the benefit will be the total of the basic monthly rate specified in paragraph (b) or (d) of this section and any applicable increases specified in paragraph (c) or (e) of this section.

(b) *Basic monthly rate.* Except as provided in paragraph (d) of this section, the basic monthly rate of DIC for a surviving spouse will be the amount set forth in 38 U.S.C. 1311(a)(1).

(c) *Section 1311(a)(2) increase.* The basic monthly rate under paragraph (b) of this section shall be increased by the amount specified in 38 U.S.C. 1311(a)(2) if the veteran, at the time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of at least eight years immediately preceding death. Determinations of entitlement to this increase shall be made in accordance with paragraph (f) of this section.

(d) *Alternative basic monthly rate for death occurring prior to January 1, 1993.* The basic monthly rate of DIC for a surviving spouse when the death of the veteran occurred prior to January 1, 1993, will be the amount specified in 38 U.S.C. 1311(a)(3) corresponding to the veteran's pay grade in service, but only if such rate is greater than the total of the basic monthly rate and the section 1311(a)(2) increase (if applicable) the surviving spouse is entitled to receive under paragraphs (b) and (c) of this section. The Secretary of the concerned service department will certify the veteran's pay grade and the certification will be binding on VA. DIC paid pursuant to this paragraph may not be increased by the section 1311(a)(2) increase under paragraph (c) of this section.

(e) *Additional increases.* One or more of the following increases may be paid in addition to the basic monthly rate and the section 1311(a)(2) increase.

(1) *Increase for children.* If the surviving spouse has one or more children under the age of 18 of the deceased veteran (including a child not in the surviving spouse's actual or constructive custody, or a child who is in active military service), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(b) for each child.

(2) *Increase for regular aid and attendance.* If the surviving spouse is determined to be in need of regular aid and attendance under the criteria in §3.352 or is a patient in a nursing home, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(c).

(3) *Increase for housebound status.* If the surviving spouse does not qualify for the regular aid and attendance allowance but is housebound under the criteria in §3.351(f), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(d).

(4) For a two-year period beginning on the date entitlement to dependency and indemnity compensation commenced, the dependency and indemnity compensation paid monthly to a surviving spouse with one or more children below the age of 18 shall be increased by the amount set forth in 38 U.S.C. 1311(f), regardless of the number of such children. The dependency and indemnity compensation payable under this paragraph is in addition to any other dependency and indemnity compensation payable. The increase in dependency and indemnity compensation of a surviving spouse under this paragraph shall cease beginning with the first

month commencing after the month in which all children of the surviving spouse have attained the age of 18.

(f) *Criteria governing section 1311(a)(2) increase.* In determining whether a surviving spouse qualifies for the section 1311(a)(2) increase under paragraph (c) of this section, the following standards shall apply.

(1) *Marriage requirement.* The surviving spouse must have been married to the veteran for the entire eight-year period referenced in paragraph (c) of this section in order to qualify for the section 1311(a)(2) increase.

(2) *Determination of total disability.* As used in paragraph (c) of this section, the phrase “rated by VA as totally disabling” includes total disability ratings based on unemployability (§4.16 of this chapter).

(3) *Definition of “entitled to receive”.* As used in paragraph (c) of this section, the phrase “entitled to receive” means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the period specified in paragraph (c) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran’s lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran’s death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran’s lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§3.156(c) and 3.400(q)(2) of this part for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

- (A) VA was paying the compensation to the veteran’s dependents;
- (B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;
- (C) The veteran had not waived retired or retirement pay in order to receive compensation;
- (D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);
- (E) VA was withholding payments because the veteran’s whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309. (Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321).

[70 FR 72220, Dec. 2, 2005, as amended at 71 FR 44918, Aug. 8, 2006; 77 FR 40525, July 10, 2012]

Supplement *Highlights* references: 69(1), 72(2), 103(2).

Reserved

Reserved

§3.22 DIC benefits for survivors of certain veterans rated totally disabled at time of death.

(a) Even though a veteran died of non-service-connected causes, VA will pay death benefits to the surviving spouse or children in the same manner as if the veteran's death were service-connected, if:

- (1) The veteran's death was not the result of his or her own willful misconduct, and
- (2) At the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was:
 - (i) Rated by VA as totally disabling for a continuous period of at least 10 years immediately preceding death;
 - (ii) Rated by VA as totally disabling continuously since the veteran's release from active duty and for at least 5 years immediately preceding death; or
 - (iii) Rated by VA as totally disabling for a continuous period of not less than one year immediately preceding death, if the veteran was a former prisoner of war. (Authority: 38 U.S.C. 1318(b))

(b) For purposes of this section, "entitled to receive" means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(1) The veteran would have received total disability compensation at the time of death for a service-connected disability rated totally disabling for the period specified in paragraph (a)(2) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(2) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§3.156(c) and 3.400(q)(2) of this part for the relevant period specified in paragraph (a)(2) of this section; or

(3) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (a)(2), but was not receiving compensation because:

- (i) VA was paying the compensation to the veteran's dependents;
- (ii) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(iii) The veteran had not waived retired or retirement pay in order to receive compensation;

(iv) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(v) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(vi) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(c) For purposes of this section, "rated by VA as totally disabling" includes total disability ratings based on unemployability (§4.16 of this chapter).

(d) To be entitled to benefits under this section, a surviving spouse must have been married to the veteran—

(1) For at least 1 year immediately preceding the date of the veteran's death; or

(2) For any period of time if a child was born of the marriage, or was born to them before the marriage. (Authority: 38 U.S.C. 1318)

(e) *Effect of judgment or settlement.* If a surviving spouse or child eligible for benefits under paragraph (a) of this section receives any money or property pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran, benefits payable under paragraph (a) of this section shall not be paid for any month following the month in which such money or property is received until the amount of benefits that would otherwise have been payable under paragraph (a) of this section equals the total of the amount of money received and the fair market value of the property received. The provisions of this paragraph do not apply, however, to any portion of such benefits payable for any period preceding the end of the month in which such money or property of value is received. (Authority: 38 U.S.C. 501(a))

(f) *Social security and worker's compensation.* Benefits received under social security or worker's compensation are not subject to recoupment under paragraph (e) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(g) *Beneficiary's duty to report.* Any person entitled to benefits under paragraph (a) of this section shall promptly report to the Department of Veterans Affairs the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorney's fees, may not be deducted from the amount to be reported.

(h) *Relationship to survivor benefit plan.* For the purpose of 10 U.S.C. 1448(d) and 1450(c) eligibility for benefits under paragraph (a) of this section shall be deemed eligibility for dependency and indemnity compensation under 38 U.S.C. 1311(a). (Authority: 38 U.S.C. 1318)

[44 FR 22718, Apr. 17, 1979, as amended at 48 FR 41161, Sept. 14, 1983; 53 FR 23235, June 21, 1988; 54 FR 31829, Aug. 2, 1989; 65 FR 3391, Jan. 21, 2000; 65 FR 43699, July 14, 2000; 70 FR 72220, Dec. 2, 2005; 77 FR 40526, July 10, 2012]

Cross references: Marriage dates. See §3.54. Homicide. See §3.11.

Supplement *Highlights* references: 40(1), 43(1), 69(1), 103(3).