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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 113

Covering period of *Federal Register* issues
through September 1, 2015

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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. 113

5 September 2015

Covering the period of Federal Register issues
through September 1, 2015

When **Book B** was originally prepared, it was current through final regulations published in the *Federal Register* of 9 August 1991. These supplemental materials are designed to keep your regulations up to date. You should file the attached pages immediately, and record the fact that you did so on the *Supplement Filing Record* which begins on page B-5 of Book B, *Adjudication*.

B-113-3

**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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3. After filing, enter the relevant information on the Supplement Filing Record sheet (page B-5)—the date filed, name/initials of filer, and date through which the *Federal Register* is covered.
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FILING INSTRUCTIONS

**Book B, Supplement No. 113
September 5, 2015**

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
3.57-1 to 3.60-1	3.57-1 to 3.60-1	§§3.57 & 3.58
3.454-1 to 3.458-1	3.454-1 to 3.458-1	§3.458

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HIGHLIGHTS

Book B, Supplement No. 113 September 5, 2015

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 13 August 2015, the VA published a final rule effective 14 September 2015, to amend its regulations to clarify that a veteran will not receive the dependent rate of disability compensation for a child who is adopted out of the veteran’s family. Changes:

- In §3.57, revised paragraph (a)(1), added paragraph (a)(4), and revised the cross references,
- Revised §3.58, and
- In §3.458, revised paragraph (d) and added cross references.



§3.57 Child.(a) *General.*

(1) Except as provided in paragraphs (a)(2) through (4) of this section, the term “child” of the veteran means an unmarried person who is a legitimate child, a child legally adopted before the age of 18 years, a stepchild who acquired that status before the age of 18 years and who is a member of the veteran’s household or was a member of the veteran’s household at the time of the veteran’s death, or an illegitimate child; and

(i) Who is under the age of 18 years; or

(ii) Who, before reaching the age of 18 years, became permanently incapable of self-support; or

(iii) Who, after reaching the age of 18 years and until completion of education or training (but not after reaching the age of 23 years) is pursuing a course of instruction at an educational institution approved by the Department of Veterans Affairs. For the purposes of this section and §3.667, the term “educational institution” means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria, including schools, colleges, academies, seminaries, technical institutes, and universities. The term also includes home schools that operate in compliance with the compulsory attendance laws of the States in which they are located, whether treated as private schools or home schools under State law. The term “home schools” is limited to courses of instruction for grades kindergarten through 12. (Authority: 38 U.S.C. 101(4)(A), 104(a))

(2) For the purposes of determining entitlement of benefits based on a child’s school attendance the term “child” of the veteran also includes the following unmarried persons:

(i) A person who was adopted by the veteran between the ages of 18 and 23 years.

(ii) A person who became a stepchild of the veteran between the ages of 18 and 23 years and who is a member of the veteran’s household or was a member of the veteran’s household at the time of the veteran’s death.

(3) Subject to the provisions of paragraphs (c) and (e) of this section, the term “child” also includes a person who became permanently incapable of self-support before reaching the age of 18 years, who was a member of the veteran’s household at the time he or she became 18 years of age, and who was adopted by the veteran, regardless of the age of such person at the time of adoption. (Authority: 38 U.S.C. 101(4)(A))

(4) For purposes of any benefits provided under 38 U.S.C. 1115, Additional compensation for dependents, the term child does not include a child of a veteran who is adopted out of the family of the veteran. This limitation does not apply to any benefit administered by the Secretary that is payable directly to a child in the child’s own right, such as dependency and indemnity compensation under 38 CFR 3.5. (Authority: 38 U.S.C. 101(4), 501, 1115).

(b) *Stepchild*. The term means a legitimate or an illegitimate child of the veteran's spouse. A child of a surviving spouse whose marriage to the veteran is deemed valid under the provisions of §3.52, and who otherwise meets the requirements of this section is included.

(c) *Adopted child*. Except as provided in paragraph (e) of this section, the term means a child adopted pursuant to a final decree of adoption, a child adopted pursuant to an unrescinded interlocutory decree of adoption while remaining in the custody of the adopting parent (or parents) during the interlocutory period, and a child who has been placed for adoption under an agreement entered into by the adopting parent (or parents) with any agency authorized under law to so act, unless and until such agreement is terminated, while the child remains in the custody of the adopting parent (or parents) during the period of placement for adoption under such agreement. The term includes, as of the date of death of a veteran, such a child who:

(1) Was living in the veteran's household at the time of the veteran's death, and

(2) Was adopted by the veteran's spouse under a decree issued within 2 years after August 25, 1959, or the veteran's death whichever is later, and

(3) Was not receiving from an individual other than the veteran or the veteran's spouse, or from a welfare organization which furnishes services or assistance for children, recurring contributions of sufficient size to constitute the major portion of the child's support. (Authority: 38 U.S.C. 101(4))

(d) *Definition of "child custody."* The provisions of this paragraph are for the purpose of determining entitlement to improved pension under §§3.23 and 3.24.

(1) Custody of a child shall be considered to rest with a veteran, surviving spouse of a veteran or person legally responsible for the child's support if that person has the legal right to exercise parental control and responsibility for the welfare and care of the child. A child of the veteran residing with the veteran, surviving spouse of the veteran who is the child's natural or adoptive parent, or person legally responsible for the child's support shall be presumed to be in the custody of that individual. Where the veteran surviving spouse, or person legally responsible for the child's support has not been divested of legal custody, but the child is not residing with that individual, the child shall be considered in the custody of the individual for purposes of Department of Veterans Affairs benefits.

(2) The term "person legally responsible for the child's support" means a person who is under a legally imposed obligation (e.g., by statute or court order) to provide for the child's support, as well as a natural or adoptive parent who has not been divested of legal custody. If the child's natural or adoptive parent has remarried, the stepparent may also be considered a person legally responsible for the child's support. A child shall be considered in the joint custody of his or her stepparent and natural or adoptive parent so long as the natural or adoptive parent and the stepparent are not estranged and residing apart and the natural or adoptive parent has not been divested of legal custody. When a child is in such joint custody the combined income of the natural or adoptive parent and the stepparent shall be included as income of the person legally responsible for support under §3.24(c).

(3) A person having custody of a child prior to the time the child attains age 18 shall be considered to retain custody of the child for periods on and after the child's 18th birthday, unless the person is divested of legal custody. This applies without regard to when a child reaches the age of majority under applicable State law. This also applies without regard to whether the child was entitled to pension prior to age 18, or whether increased pension was payable to a veteran or surviving spouse on behalf of the child prior to the child's 18th birthday. If the child's custodian dies after the child has attained age 18, the child shall be considered to be in custody of a successor custodian provided the successor custodian has the right to exercise parental control and responsibility for the welfare and care of the child. (Authority: 38 U.S.C. 501(a), 1521(c), 1541(c))

(e) *Child adopted under foreign law.*

(1) *General.* The provisions of this paragraph are applicable to a person adopted under the laws of any jurisdiction other than a State. The term "State" is defined in 38 U.S.C. 101(20) and also includes the Commonwealth of the Northern Mariana Islands. The term "veteran" includes, for the purposes of this paragraph, a Commonwealth Army veteran or new Philippine Scout as defined in 38 U.S.C. 3566.

(2) *Adopted child of living veteran.* A person residing outside any of the States shall not be considered to be a legally adopted child of a veteran during the lifetime of the veteran unless all of the following conditions are met.

(i) The person was less than 18 years of age at the time of adoption.

(ii) The person is receiving one-half or more of the person's support from the veteran.

(iii) The person is not in the custody of the person's natural parent unless the natural parent is the veteran's spouse.

(iv) The person is residing with the veteran (or in the case of divorce following adoption, with the divorced spouse who is also a natural or adoptive parent) except for periods during which the person is residing apart from the veteran for purposes of full-time attendance at an educational institution or during which the person or the veteran is confined in a hospital, nursing home, other health-care facility, or other institution.

(3) *Adopted child of deceased veteran.* A person shall not be considered to have been a legally adopted child of a veteran as of the date of the veteran's death and thereafter unless one of the following conditions is met.

(i) The veteran was entitled to and was receiving for the person a dependent's allowance or similar monetary benefit payable under title 38, United States Code at any time within the 1-year period immediately preceding the veteran's death; or

(ii) The person met the requirements of paragraph (e)(2) of this section for a period of at least 1 year prior to the veteran's death.

(4) *Verification.* In the case of an adopted child of a living veteran, the requirements of paragraphs (e)(2)(ii), (iii) and (iv) of this section are for prospective application. That is, in addition to meeting all of the requirements of paragraph (e)(2) of this section at the time of initial adjudication, benefits are not payable thereafter for or to a child adopted under the laws of any jurisdiction other than a State unless the requirements of paragraphs (e)(2)(ii), (iii) and (iv) of this section continue to be met. Consequently, whenever Department of Veterans Affairs benefits are payable to or for a child adopted under the laws of any jurisdiction other than a State, and the veteran who adopted the child is living, the beneficiary shall submit, upon Department of Veterans Affairs request, a report, or other evidence, to determine if the requirements of paragraph (e)(2)(ii), (iii), and (iv) of this section were met for any period for which payment was made for or to the child and whether such requirements will continue to be met for future entitlement periods. Failure to submit the requested report or evidence within a reasonable time from date of request may result in termination of benefits payable for or to the child. (Authority: 38 U.S.C. 101(4), 501(a))

[44 FR 45935, Aug. 6, 1979 and 45 FR 1878, Jan. 9, 1980, as amended at 45 FR 25391, Apr. 15, 1980; 49 FR 47003, Nov. 30, 1984; 62 FR 51281, Sept. 30, 1997; 65 FR 12116, Mar. 8, 2000; 72 FR 6959, Feb. 14, 2007; 80 FR 48451, Aug. 13, 2015]

CROSS REFERENCES: Improved pension rates. See §3.23. Improved pension rates; surviving children. See §3.24. Child adopted out of family. See §3.58. Child's relationship. See §3.210. Helplessness. See §3.403(a)(1). Helplessness. See §3.503(a)(3). Veteran's benefits not apportionable. See §3.458. School attendance. See §3.667. Helpless children--Spanish-American and prior wars. See §3.950.

Supplement *Highlight* references: 41(1), 76(1), 113(1).

§3.58 Child adopted out of family.

(a) Except as provided in paragraph (b) of this section, a child of a veteran adopted out of the family of the veteran either prior or subsequent to the veteran's death is nevertheless a child within the meaning of that term as defined by §3.57 and is eligible for benefits payable under all laws administered by the Department of Veterans Affairs.

(b) A child of a veteran adopted out of the family of the veteran is not a child within the meaning of §3.57 for purposes of any benefits provided under 38 U.S.C. 1115, Additional compensation for dependents. (Authority: 38 U.S.C. 101(4)(A), 1115).

CROSS REFERENCES: Child. See §3.57. Veteran's benefits not apportionable. See §3.458.

[26 FR 1568, Feb. 24, 1961; as amended at 80 FR 48451, Aug. 13, 2015]

Supplement *Highlights* Reference: 113(1).

§3.59 Parent.

(a) The term “parent” means a natural mother or father (including the mother of an illegitimate child or the father of an illegitimate child if the usual family relationship existed), mother or father through adoption, or a person who for a period of not less than 1 year stood in the relationship of a parent to a veteran at any time before his or her entry into active service.

(b) Foster relationship must have begun prior to the veteran’s 21st birthday. Not more than one father and one mother, as defined, will be recognized in any case. If two persons stood in the relationship of father or mother for 1 year or more, the person who last stood in such relationship before the veteran’s last entry into active service will be recognized as the “parent.” (Authority: 38 U.S.C. 101(5))

[26 FR 1568, Feb. 24, 1961, as amended at 44 FR 45935, Aug. 6, 1979]

§3.60 Definition of “living with.”

For the purposes of determining entitlement to pension under 38 U.S.C. 1521, a person shall be considered as living with his or her spouse even though they reside apart unless they are estranged. (Authority: 38 U.S.C. 1521(h)(2))

[44 FR 45935, Aug. 6, 1979]

Next Section is §3.100

§3.454 Veterans disability pension.

Apportionment of disability pension will be as follows:

(a) Where a veteran with spouse, or child is incompetent and without legal fiduciary and is maintained in an institution by the United States or any political subdivision thereof, \$25 monthly will be paid as an institutional award to the Director of a Department of Veterans Affairs medical center or chief officer of a non-Department of Veterans Affairs institution for the use of the veteran, and the balance will be paid to the dependent or dependents. If the veteran has no spouse, or child but has a dependent parent, apportionment will be in accordance with §3.451.

(b) (1) Where the amount of section 306 pension payable to a married veteran under 38 U.S.C. 1521(b), as in effect on December 31, 1978, is reduced to \$50 monthly under §3.551(c), an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between \$50 and the total amount of pension payable on December 31, 1978. (Authority: 38 U.S.C. 5503(a))

(2) Where the amount of improved pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to \$60 monthly under §3.551(d) or (e)(2), an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between \$60 and the rate payable if pension was being paid under 38 U.S.C. 1521(c) including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled. (Authority: 38 U.S.C. 5503(a))

(3) Where the amount of improved pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to \$90 monthly under §3.551(e)(1) an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between \$90 and the rate payable if pension was being paid under 38 U.S.C. 1521(c) including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled. (Authority: 38 U.S.C. 3203(a))

[40 FR 36329, Aug. 20, 1975, as amended at 44 FR 45940, Aug. 6, 1979; 56 FR 65848, Dec. 19, 1991; 57 FR 7847, Mar. 4, 1992; 68 FR 34542, June 10, 2003]

Supplement *Highlights* reference: 57(1)

Next Section is §3.458

§3.458 Veteran's benefits not apportionable.

Veteran's benefits will not be apportioned:

(a) Where the total benefit payable to the disabled person does not permit payment of a reasonable amount to any apportionee.

(b) Where the spouse of the disabled person has been found guilty of conjugal infidelity by a court having proper jurisdiction.

(c) For purported or legal spouse of the veteran if it has been determined that he or she has lived with another person and held herself or himself out openly to the public to be the spouse of such other person, except where such relationship was entered into in good faith with a reasonable basis (for example trickery on the part of the veteran) for the spouse believing that the marriage to the veteran was legally terminated. No apportionment to the spouse will thereafter be made unless there has been a reconciliation and later estrangement.

(d) Where the child of the disabled person has been legally adopted by another person.

(e) Where a child enters the active military, air, or naval service, any additional amount will be paid to the veteran unless such child is included in an existing apportionment to an estranged spouse. No adjustment in the apportioned award will be made based on the child's entry into service.

(f) (1) For the spouse, child, father or mother of a disabled veteran, where forfeiture was declared prior to September 2, 1959, if the dependent is determined by the Department of Veterans Affairs to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies.

(2) For any dependent of a disabled veteran, or surviving spouse where forfeiture of benefits by a person primarily entitled was declared after September 1, 1959, by reason of fraud, treasonable acts, or subversive activities. (Authority: 38 U.S.C. 6103(b); 6104(c); 6105(a))

(g) Until the estranged spouse of a veteran files claim for an apportioned share. If there are any children of the veteran not in his or her custody an apportionment will not be authorized unless and until a claim for an apportioned share is filed in their behalf.

CROSS REFERENCES: Child. See §3.57. Child adopted out of family. See §3.58.

[26 FR 7266, Aug. 11, 1961, as amended at 40 FR 21724, May 19, 1975; 44 FR 45940, Aug. 6, 1979; 61 FR 20727, May 8, 1996; 80 FR 48451, Aug. 13, 2015]

Supplement *Highlights* Reference: 113(1).