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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 117

Covering period of *Federal Register* issues
through June 1, 2018

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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. 117

5 June 2018

Covering the period of Federal Register issues
through June 1, 2018

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-117-3

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FILING INSTRUCTIONS

**Book B, Supplement No. 117
June 5, 2018**

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
3.350-9 to 3.350- <u>10</u>	3.350-9 to 3.350- <u>12</u>	§3.350
3.352-1 to 3.352-2	3.352-1 to 3.352-2	§3.352
3.551-5 to 3.552-3	3.551-5 to 3.552-3	§3.552

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HIGHLIGHTS

Book B, Supplement No. 117 June 5, 2018

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 8 May 2018, the VA published a final rule effective 7 June 2018, to amend its adjudication regulations to add an additional compensation benefit for veterans with residuals of traumatic brain injury (TBI). This final rule incorporates in regulations a benefit authorized by the enactment of the Veterans' Benefits Act of 2010. The Veterans' Benefits Act authorizes special monthly compensation (SMC) for veterans with TBI who are in need of aid and attendance, and in the absence of such aid and attendance, would require hospitalization, nursing home care, or other residential institutional care. Changes:

- In §3.350, added paragraph (j),
- In §3.352, redesignated paragraphs (b)(2) through (b)(5) and (b)(3) through (b)(6), and added paragraph (b)(2).
- In §3.552, revised paragraph (b)(2).



disability or disabilities independently ratable at 50 percent or more must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114(l) through (n) or the intermediate rate provisions outlined above. The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

(4) *Additional independent 100 percent ratings.* In addition to the statutory rates payable under 38 U.S.C. 1114(l) through (n) and the intermediate or next higher rate provisions outlined above additional single permanent disability independently ratable at 100 percent apart from any consideration of individual unemployability will afford entitlement to the next higher statutory rate under 38 U.S.C. 1114 or if already entitled to an intermediate rate to the next higher intermediate rate, but in no event higher than the rate for (o). In the application of this subparagraph the single permanent disability independently ratable at 100 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114(l) through (n) or the intermediate rate provisions outlined above.

(i) Where the multiple loss or loss of use entitlement to a statutory or intermediate rate between 38 U.S.C. 1114(l) and (o) is caused by the same etiological disease or injury, that disease or injury may not serve as the basis for the independent 50 percent or 100 percent unless it is so rated without regard to the loss or loss of use.

(ii) The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

(5) *Three extremities.* Anatomical loss or loss of use, or a combination of anatomical loss and loss of use, of three extremities shall entitle a veteran to the next higher rate without regard to whether that rate is a statutory rate or an intermediate rate. The maximum monthly payment under this provision may not exceed the amount stated in 38 U.S.C. 1114(p).

(g) *Inactive tuberculosis (complete arrest).* The rating criteria for determining inactivity of tuberculosis are set out in §3.375.

(1) For a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the minimum monthly rate is \$67. This minimum special monthly compensation is not to be combined with or added to any other disability compensation.

(2) For a veteran who was not receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the special monthly compensation authorized by paragraph (g)(1) of this section is not payable.

(h) *Special aid and attendance benefit; 38 U.S.C. 1114(r):*

(1) *Maximum compensation cases.* A veteran receiving the maximum rate under 38 U.S.C. 1114 (o) or (p) who is in need of regular aid and attendance or a higher level of care is entitled to an additional allowance during periods he or she is not hospitalized at United States Government expense. (See §3.552(b)(2) as to continuance following admission for hospitalization.) Determination of this need is subject to the criteria of §3.352. The regular or higher level aid and attendance allowance is payable whether or not the need for regular aid and

attendance or a higher level of care was a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114(o) or (p), or was based on an independent factual determination.

(2) *Entitlement to compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o) plus special monthly compensation under 38 U.S.C. 1114(k).* A veteran receiving compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o) plus special monthly compensation under 38 U.S.C. 1114(k) who establishes a factual need for regular aid and attendance or a higher level of care, is also entitled to an additional allowance during periods he or she is not hospitalized at United States Government expense. (See §3.552(b)(2) as to continuance following admission for hospitalization.) Determination of the factual need for aid and attendance is subject to the criteria of §3.352.

(3) *Amount of the allowance.* The amount of the additional allowance payable to a veteran in need of regular aid and attendance is specified in 38 U.S.C. 1114(r)(1). The amount of the additional allowance payable to a veteran in need of a higher level of care is specified in 38 U.S.C. 1114(r)(2). The higher level aid and attendance allowance authorized by 38 U.S.C. 1114(r)(2) is payable in lieu of the regular aid and attendance allowance authorized by 38 U.S.C. 1114(r)(1).

(i) *Total plus 60 percent, or housebound; 38 U.S.C. 1114(s).* The special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent and:

(1) Has additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems, or

(2) Is permanently housebound by reason of service-connected disability or disabilities. This requirement is met when the veteran is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.

(j) Special aid and attendance benefit for residuals of traumatic brain injury (38 U.S.C. 1114(t)). The special monthly compensation provided by 38 U.S.C. 1114(t) is payable to a veteran who, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under 38 U.S.C. 1114(r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care. Determination of this need is subject to the criteria of Sec. 3.352.

(1) A veteran described in this paragraph (j) shall be entitled to the amount equal to the compensation authorized under 38 U.S.C. 1114(o) or the maximum rate authorized under 38 U.S.C. 1114(p) and, in addition to such compensation, a monthly allowance equal to the rate described in 38 U.S.C. 1114(r)(2) during periods he or she is not hospitalized at United States Government expense. (See Sec. 3.552(b)(2) as to continuance following admission for hospitalization.)

(2) An allowance authorized under 38 U.S.C. 1114(t) shall be paid in lieu of any allowance authorized by 38 U.S.C. 1114(r)(1). (Authority: 38 U.S.C. 501, 38 U.S.C. 1114(t))

[26 FR 1587, Feb. 24, 1961, as amended at 27 FR 4739, May 18, 1962; 28 FR 1587, Feb. 20, 1963; 28 FR 5671, June 11, 1963; 40 FR 54245, Nov. 21, 1975; 45 FR 25392, Apr. 15, 1980; 46 FR 47541, Sept. 29, 1981; 48 FR 41161, Sept. 14, 1983; 49 FR 47003, Nov. 30 1984; 54 FR 34981, Aug. 23, 1989; 60 FR 12886, Mar. 9, 1995; 67 FR 6873, Feb. 14, 2002; 68 FR 55467, Sept. 26, 2003; 74 FR 11483, Mar. 18, 2009; 83 FR 20736, May 8, 2018]

Supplement *Highlights* references: 15(1), 50(2), 60(1), 85(1), 117(1).

[Reserved]

**§3.352 Criteria for determining need for aid and attendance and
“permanently bedridden.”**

(a) *Basic criteria for regular aid and attendance and permanently bedridden.* The following will be accorded consideration in determining the need for regular aid and attendance (§3.351(c)(3)) inability of claimant to dress or undress himself (herself), or to keep himself (herself) ordinarily clean and presentable, frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back etc.); inability of claimant to feed himself (herself) through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment. “Bedridden” will be a proper basis for the determination. For the purpose of this paragraph “bedridden” will be that condition which, through its essential character, actually requires that the claimant remain in bed. The fact that claimant has voluntarily taken to bed or that a physician has prescribed rest in bed for the greater or lesser part of the day to promote convalescence or cure will not suffice. It is not required that all of the disabling conditions enumerated in this paragraph be found to exist before a favorable rating may be made. The particular personal functions which the veteran is unable to perform should be considered in connection with his or her condition as a whole. It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need. Determinations that the veteran is so helpless, as to be in need of regular aid and attendance will not be based solely upon an opinion that the claimant’s condition is such as would require him or her to be in bed. They must be based on the actual requirement of personal assistance from others.

(b) *Basic criteria for the higher level aid and attendance allowance.*

(1) A veteran is entitled to the higher level aid and attendance allowance authorized by §3.350(h) in lieu of the regular aid and attendance allowance when all of the following conditions are met:

(i) The veteran is entitled to the compensation authorized under 38 U.S.C. 1114(o), or the maximum rate of compensation authorized under 38 U.S.C. 1114(p).

(ii) The veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section.

(iii) The veteran needs a “higher level of care” (as defined in paragraph (b)(3) of this section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care.

(2) A veteran is entitled to the higher level aid and attendance allowance authorized by §3.350(j) in lieu of the regular aid and attendance allowance when all of the following conditions are met:

(i) As a result of service-connected residuals of traumatic brain injury, the veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section.

(ii) As a result of service-connected residuals of traumatic brain injury, the veteran needs a “higher level of care” (as defined in paragraph (b)(3) of this section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care.

(3) Need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the veteran’s home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions which require professional health-care training or the regular supervision of a trained health-care professional to perform. A licensed health-care professional includes (but is not limited to) a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or political subdivision thereof.

(4) The term “under the regular supervision of a licensed health-care professional,” as used in paragraph (b)(3) of this section, means that an unlicensed person performing personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and that the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call will suffice.

(5) A person performing personal health-care services who is a relative or other member of the veteran’s household is not exempted from the requirement that he or she be a licensed health-care professional or be providing such care under the regular supervision of a licensed health-care professional.

(6) The provisions of paragraph (b) of this section are to be strictly construed. The higher level aid-and-attendance allowance is to be granted only when the veteran’s need is clearly established and the amount of services required by the veteran on a daily basis is substantial.

(c) *Attendance by relative.* The performance of the necessary aid and attendance service by a relative of the beneficiary or other member of his or her household will not prevent the granting of the additional allowance. (Authority: 38 U.S.C. 501, 1114(r)(2), 1114(t))

[41 FR 29680, July 19, 1976, as amended at 44 FR 22720, Apr. 17, 1979; 60 FR 27409, May 24, 1995; 61 FR 68666, Dec. 30, 1996; 83 FR 20737, May 8, 2018]

Supplement *Highlights* references: 16(2), 26(1), 117(1).

(i) The veteran remains hospitalized or in a nursing home after the expiration of the additional period provided by paragraph (h)(1) of this section; and

(ii) The Chief Medical Director, or designee, certifies that the primary purpose for furnishing continued hospital or nursing home care after the additional period provided by paragraph (h)(1) of this section is to provide the veteran with a program of rehabilitation under chapter 17 of title 38, United States Code designed to restore the veteran's ability to function within the veteran's family and community.

(3) *Termination of hospitalization for rehabilitation.* Pension in excess of \$60 monthly or \$90, if reduction is under paragraph (e)(1), payable to a veteran under this paragraph shall be reduced the end of the calendar month in which the primary purpose of hospitalization or nursing home care is no longer to provide the veteran with a program of rehabilitation under chapter 17 of title 38, United States Code designed to restore the veteran's ability to function within the veteran's family and community. (Authority: 38 U.S.C. 5503(a))

(i) *Certain veterans and surviving spouses receiving Medicaid-covered nursing home care.* Effective November 5, 1990, and terminating on September 30, 2011, if a veteran having neither spouse nor child, or a surviving spouse having no child, is receiving Medicaid-covered nursing home care, no pension or death pension in excess of \$90 per month shall be paid to or for the veteran or the surviving spouse for any period after the month in which the Medicaid payments begin. A veteran or surviving spouse is not liable for any pension paid in excess of the \$90 per month by reason of the Secretary's inability or failure to reduce payments, unless that inability or failure is the result of willful concealment by the veteran or surviving spouse of information necessary to make that reduction. (Authority: 38 U.S.C. 5503)

[27 FR 7677, Aug. 3, 1962, as amended at 27 FR 8793, Sept. 1, 1962; 37 FR 19133, Sept. 19, 1972; 39 FR 32988, Sept. 13, 1974; 40 FR 45169, Oct. 1, 1975; 41 FR 18412, May 4, 1976; 44 FR 45941, Aug. 6 1979; 45 FR 35327, May 27, 1980; 46 FR 47541, Sept. 29, 1981; 47 FR 24551, June 7, 1982; 56 FR 25045, June 3, 1991; 56 FR 65848, Dec. 19, 1991; 57 FR 8578, Mar. 11, 1992; 58 FR 32445, June 10, 1993; 59 FR 62584, Dec. 6, 1994; 64 FR 32807, June 18, 1999; 66 FR 48560, Sept. 21, 2001; 68 FR 34542, June 10, 2003]

Cross references: Time limits. See §3.109. Apportionment. See §3.400(e). Reductions and discontinuances; general. See §3.500. Incompetents; resumption. See §3.558.

Supplement *Highlights* references: 8(2d), 14(2), 38(4), 47(2), 57(1).

§3.552 Adjustment of allowance for aid and attendance.

(a) (1) When a veteran who is already entitled to the aid and attendance allowance is hospitalized, the additional compensation or increased pension for aid and attendance shall be discontinued as provided in paragraph (b) of this section except as to disabilities specified in paragraph (a)(2) of this section. (See paragraph (k) of this section for rules applicable to a veteran who establishes entitlement to the aid and attendance allowance on or after date of admission to hospitalization).

(2) The allowance for aid and attendance will be continued during hospitalization where the disability is paraplegia involving paralysis of both lower extremities together with loss of anal and bladder sphincter control, or Hansen's disease, except where discontinuance is required by paragraph (b)(2) of this section. In addition, in pension cases only, the aid and attendance allowance will be continued where the pensionable disability is blindness (visual acuity 5/200 or less) or concentric contraction of visual field to 5 degrees or less. Awards are, however, subject to the provisions of §3.551 (except where the disabling condition is Hansen's disease).

(3) Additional compensation for dependents under §3.4(b)(2) is payable during hospitalization in addition to the rates authorized by this section. The rates specified will also be increased by amounts authorized under 38 U.S.C. 1114(k) based on independently ratable disability, subject to the statutory ceiling on the total amount of compensation payable as set forth in §3.350(a).

(b) (1) Where a veteran is admitted for hospitalization on or after October 1, 1964, the additional compensation or increased pension for aid and attendance will be discontinued effective the last day of the month following the month in which the veteran is admitted for hospitalization at the expense of the Department of Veterans Affairs.

(2) When a veteran is hospitalized at the expense of the United States Government, the additional aid and attendance allowance authorized by 38 U.S.C. 1114(r)(1) or (2) or 38 U.S.C. 1114(t) will be discontinued effective the last day of the month following the month in which the veteran is admitted for hospitalization.

(3) Where a veteran affected by the provisions of paragraph (b)(1) and (2) or paragraph (k) of this section is discharged or released from the hospital against medical advice or as the result of disciplinary action and is readmitted to such hospitalization within 6 months after that date, the allowance, additional compensation, or increased pension will be discontinued effective the day preceding the date of readmission. A readmission 6 months or more after such discharge or release will be considered as a new admission.

(c) Reduction will not be made where the same monthly rate of compensation would be payable without consideration of need for regular aid and attendance. This can only be determined after careful review of the current maximum entitlement without regard to any amount for aid and attendance.

(d) Where entitlement by reason of need for regular aid and attendance is the basis of the monthly rate under 38 U.S.C. 1114(l) the award will be reduced to the rate payable under 38 U.S.C. 1114(s).

(e) Where a veteran is in receipt of section 306 pension, the aid and attendance allowance shall be reduced to the housebound rate of \$61 monthly (or \$76.25 if the veteran was age 78 or older on December 31, 1978). Where a veteran is in receipt of old-law pension, the total amount payable shall be reduced to \$100 monthly. Where a veteran is in receipt of improved pension, the applicable aid and attendance rate shall be reduced to the otherwise applicable rate under 38 U.S.C. 1521(e). No reduction shall be made, however, for any case involving the disabilities specified in paragraph (a)(2) of this section.

(f) Where entitlement to the rate in 38 U.S.C. 1114(o) is based in part on need for regular aid and attendance reduction because of being hospitalized will be to the rate payable for the other conditions shown.

(g) Where a veteran entitled to one of the rates under 38 U.S.C. 1114(l), (m), or (n) by reason of anatomical losses or losses of use of extremities, blindness (visual acuity 5/200 or less or light perception only), or anatomical loss of both eyes is being paid compensation at the rate under 38 U.S.C. 1114(o) because of entitlement to another rate under section 1114(l) on account of need for aid and attendance, the compensation will be reduced while hospitalized to the following:

(1) If entitlement is under section 1114(l) and in addition there is need for regular aid and attendance for another disability, the award during hospitalization will be at the rate under 38 U.S.C. 1114(m) since the disability requiring aid and attendance is 100 percent disabling. (Authority: 38 U.S.C. 1114(p))

(2) If entitlement is under section 1114(m), at the rate under 38 U.S.C. 1114(n).

(3) If entitlement is under section 1114(n), the rate under 38 U.S.C. 1114(o) would be continued, since the disability previously causing the need for regular aid and attendance would then be totally disabling entitling the veteran to the maximum rate under 38 U.S.C. 1114(p).

(h) If, because of blindness, a veteran requires regular aid and attendance, but has better vision than “light perception only” the award under 38 U.S.C. 1114(m) will be reduced while hospitalized to the rate payable under 38 U.S.C. 1114(l).

(i) If the disability meets the aid and attendance requirements of 38 U.S.C. 1114(l) and the intermediate or next higher rate was assigned for disability independently ratable at 50 percent or 100 percent, the award based on such entitlement will be reduced because of hospitalization to the amount payable under 38 U.S.C. 1114(s).

(j) The section 308 pension aid and attendance allowance authorized by §3.252(f) is subject to reduction for hospitalization under the provisions of this section in the same manner as the regular section 306 pension aid and attendance allowance. The amount payable shall not be

reduced to less than the housebound rate of \$61 monthly (or \$76.25 monthly if the veteran was age 78 or older on December 31, 1978).

(k) (1) This paragraph is applicable to hospitalized veterans who were not entitled to the aid and attendance allowance prior to hospital admission but who establish entitlement to it on or after the date of hospital admission.

(2) If the effective date of entitlement to the aid and attendance allowance is on or after the date of admission to hospitalization, the aid and attendance allowance shall not be paid until the date of discharge or release from hospitalization, unless the aid and attendance allowance is based on a disability specified in paragraph (a)(2) of this section. If the aid and attendance allowance is based on a disability specified in paragraph (a)(2) of this section, the aid and attendance allowance shall be paid during hospitalization.

(3) If the aid and attendance allowance is not payable to a veteran under paragraph (k)(2) of this section, the veteran shall receive the appropriate reduced rate under paragraphs (d) through (j) of this section while hospitalized. (Authority: 38 U.S.C. 5503(c))

[28 FR 1588, Feb. 20, 1963, as amended at 30 FR 14983, Dec. 3, 1965; 32 FR 13226, Sept. 19, 1967; 37 FR 19133, Sept. 19, 1972; 38 FR 34115, Dec. 11, 1973; 41 FR 55875, Dec. 23, 1976; 44 FR 22721, Apr. 17, 1979; 44 FR 45941, Aug. 6, 1979; 46 FR 31011, June 12, 1981; 46 FR 47541, Sept. 29, 1981; 68 FR 34542, June 10, 2003; 83 FR 20737, May 8, 2018]

Supplement *Highlights* references: 57(1), 117(1)