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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 107

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

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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. 107

5 February 2014

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

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B-107-3

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1. Always file your supplemental materials immediately upon receipt.
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FILING INSTRUCTIONS

**Book B, Supplement No. 107
February 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>
3.1-5 to 3.1-6	3.1-5 to 3.1-6	§3.1
3.100-1 to 3.101-1	3.100-1 to 3.101-1	§3.100
3.320-1 to 3.321-1	3.320-1 to 3.321-1	§3.321
3.327-2 to 3.328-1	3.327-2 to 3.328-1	§3.328
3.814-1 to 3.815-7	3.814-1 to 3.815-7	§§3.814 & 3.815
3.905-1 to 3.905-2	3.905-1 to 3.905-2	§3.905

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HIGHLIGHTS

Book B, Supplement No. 107 February 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 13 January 2013, the VA published a final rule effective that same day, amending its regulations by making non-substantive changes to reflect new titles of certain VA offices.

Changes:

- In §3.1, revised paragraph (y)(3),
- In §3.100, revised paragraphs (a) and (b),
- In §3.321, revised paragraph (b),
- In §3.328, revised paragraph (b),
- In §3.814, revised paragraph (d)(2),
- In §3.815, revised paragraph (h)(3), and
- In §3.905, revised paragraph (a).



(y) *Former prisoner of war.* The term “former prisoner of war” means a person who, while serving in the active military, naval or air service, was forcibly detained or interned in the line of duty by an enemy or foreign government, the agents of either, or a hostile force.

(1) *Decisions based on service department findings.* The Department of Veterans Affairs shall accept the findings of the appropriate service department that a person was a prisoner of war during a period of war unless a reasonable basis exists for questioning it. Such findings shall be accepted only when detention or internment is by an enemy government or its agents.

(2) *Other decisions.* In all other situations, including those in which the Department of Veterans Affairs cannot accept the service department findings, the following factors shall be used to determine prisoner of war status:

(i) *Circumstances of detention or internment.* To be considered a former prisoner of war, a serviceperson must have been forcibly detained or interned under circumstances comparable to those under which persons generally have been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions. Each individual member of a particular group of detainees or internees shall, in the absence of evidence to the contrary, be considered to have experienced the same circumstances as those experienced by the group.

(ii) *Reason for detention or internment.* The reason for which a serviceperson was detained or interned is immaterial in determining POW status, except that a serviceperson who is detained or interned by a foreign government for an alleged violation of its laws is not entitled to be considered a former POW on the basis of that period of detention or internment, unless the charges are a sham intended to legitimize the period of detention or internment.

(3) *Central Office approval.* The Director of the Compensation Service, VA Central Office, shall approve all VA regional office determinations establishing or denying POW status, with the exception of those service department determinations accepted under paragraph (y)(1) of this section.

(4) *In line of duty.* The Department of Veterans Affairs shall consider that a serviceperson was forcibly detained or interned in line of duty unless the evidence of record discloses that forcible detainment or internment was the proximate result of the serviceperson’s own willful misconduct.

(5) *Hostile force.* The term “hostile force” means any entity other than an enemy or foreign government or the agents of either whose actions are taken to further or enhance anti-American military, political or economic objectives or views or to attempt to embarrass the United States. (Authority: 38 U.S.C. 101(32))

(z) “Nursing home” means:

(1) Any extended care facility which is licensed by a State to provide skilled or intermediate-level nursing care,

(2) A nursing home care unit in a State veterans' home which is approved for payment under 38 U.S.C. 1742, or

(3) A Department of Veterans Affairs Nursing Home Care Unit.

(aa) "Fraud":

(1) As used in 38 U.S.C. 103 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining, or assisting an individual to obtain an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce; and (Authority: 38 U.S.C. 210(c))

(2) As used in 38 U.S.C. 110 and 359 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for Department of Veterans Affairs benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits. (Authority: 38 U.S.C. 501(a))

[26 FR 1563, Feb. 24, 1961, as amended at 27 FR 4023, Apr. 27, 1962; 27 FR 11886, Dec. 1, 1962; 28 FR 320, Jan. 11, 1963; 32 FR 6840, May 4, 1967; 36 FR 5341, Mar. 20, 1971; 36 FR 8445, May 6, 1971; 40 FR 16064, Mar. 3, 1975; 44 FR 45931, Aug. 6, 1979; 47 FR 38122, Aug. 30, 1982; 48 FR 38821, Aug. 26, 1983; 54 FR 31828, Aug. 2, 1989; 54 FR 34981, Aug. 23, 1989; 55 FR 8141, Mar. 7, 1990; 56 FR 19579, Apr. 20, 1991; 60 FR 27408, May 24, 1995; 61 FR 56627, Nov. 4, 1996; 69 FR 42880, July 19, 2004; 70 FR 51590, Aug. 31, 2005; 71 FR 44918, Aug. 8, 2006; 79 FR 2100, Jan. 13, 2014]

Cross-References: Pension. See §3.3. Compensation. See §3.4. Dependency and indemnity compensation. See §3.5. Preservation of disability ratings. See §3.951. Service-connection. See §3.957.

Supplement *Highlights* references: 16(1), 24(2), 62(2), 68(1), 72(2), 107(1).

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§3.100 Delegations of authority.

(a) Authority is delegated to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to make findings and decisions under the applicable laws, regulations, precedents, and instructions as to entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans and their dependents within the jurisdiction of the Compensation Service or the Pension and Fiduciary Service.

(b) Authority is delegated to the Director, Compensation Service, and the Director, Pension and Fiduciary Service, and to personnel of each service designated by its Director to determine whether a claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture pursuant to the provisions of 38 U.S.C. 6103 or 6104. See §3.905. (Authority: 38 U.S.C. 512(a))

[29 FR 7547, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 53 FR 3207, Feb. 4, 1988; 60 FR 18355, Apr. 11, 1995; 61 FR 20727, May 8, 1996; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlights* references: 15(3), 107(1).

§3.101 [Removed]

§ 3.320 [Reserved]

§3.321 General rating considerations.

(a) *Use of rating schedule.* The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities in claims for disability compensation, disability and death pension, and in eligibility determinations. The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability. (Authority: 38 U.S.C. 1155)

(b) *Exceptional cases:*

(1) *Compensation.* Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

(2) *Pension.* Where the evidence of record establishes that an applicant for pension who is basically eligible fails to meet the disability requirements based on the percentage standards of the rating schedule but is found to be unemployable by reason of his or her disability(ies), age, occupational background and other related factors, the following are authorized to approve on an extra-schedular basis a permanent and total disability rating for pension purposes: the Veterans Service Center Manager or the Pension Management Center Manager; or where regular schedular standards are met as of the date of the rating decision, the rating board.

(3) *Effective dates.* The effective date of these extra-schedular evaluations granting or increasing benefits will be in accordance with §3.400(b)(1) and (2) as to original and reopened claims and in accordance with §3.400(o) in claims for increased benefits.

(c) *Advisory opinion.* Cases in which application of the schedule is not understood or the propriety of an extra-schedular rating is questionable may be submitted to Central Office for advisory opinion.

Cross references: Effective dates; disability benefits. See §3.400(b). Effective dates; increases. See §3.400(o).

[26 FR 1583, Feb. 24, 1961, as amended at 29 FR 1463, Jan. 29, 1964; 37 FR 10442, May 23, 1972; 39 FR 5315, Feb. 12, 1974; 39 FR 32988, Sept. 13, 1974; 40 FR 57459, Dec. 10, 1975; 61 FR 20727, May 8, 1996; 67 FR 46868, July 17, 2002; 74 FR 26959; June 5, 2009; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlight* references: 87(2), 107(1).

[26 FR 1585, Feb. 24, 1961, as amended at 30 FR 11855, Sept. 16, 1965; 36 FR 14467, Aug. 6, 1971; 55 FR 49521, Nov. 29, 1990; 60 FR 27409, May 24, 1995]

Cross reference: Failure to report for VA examination. See §3.655.

Supplement *Highlights* reference: 16(2)

§3.329—[Removed]

§3.328 Independent medical opinions.

(a) *General.* When warranted by the medical complexity or controversy involved in a pending claim, an advisory medical opinion may be obtained from one or more medical experts who are not employees of VA. Opinions shall be obtained from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made, and an appropriate official of the institution shall select the individual expert(s) to render an opinion.

(b) *Requests.* A request for an independent medical opinion in conjunction with a claim pending at the regional office level may be initiated by the office having jurisdiction over the claim, by the claimant, or by his or her duly appointed representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests shall be submitted through the Veterans Service Center Manager or Pension Management Center Manager of the office having jurisdiction over the claim, and those requests which in the judgment of the Veterans Service Center Manager merit consideration shall be referred to the Compensation Service or the Pension and Fiduciary Service for approval.

(c) *Approval.* Approval shall be granted only upon a determination by the Compensation Service or the Pension and Fiduciary Service that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion. When approval has been granted, the Compensation Service or the Pension and Fiduciary Service shall obtain the opinion. A determination that an independent medical opinion is not warranted may be contested only as part of an appeal on the merits of the decision rendered on the primary issue by the agency of original jurisdiction.

(d) *Notification.* The Compensation Service or the Pension and Fiduciary Service shall notify the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and shall furnish the claimant with a copy of the opinion when it is received. If, in the judgment of the Secretary, disclosure of the independent medical opinion would be harmful to the physical or mental health of the claimant, disclosure shall be subject to the special procedures set forth in §1.577 of this chapter. (Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

[55 FR 18602, May 3, 1990, as amended at 67 FR 46868, July 17, 2002; 79 FR 2100, Jan. 13, 2014; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlights Reference:* 107(1).

§3.329 [Removed]

[55 FR 49521, Nov. 29, 1990]

§3.814 Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran or a veteran with covered service in Korea.

(a) *Monthly monetary allowance.* VA will pay a monthly monetary allowance under subchapter I of 38 U.S.C. chapter 18, based upon the level of disability determined under the provisions of paragraph (d) of this section, to or for a person who VA has determined is an individual suffering from spina bifida whose biological mother or father is or was a Vietnam veteran or a veteran with covered service in Korea. Receipt of this allowance will not affect the right of the individual or any related person to receive any other benefit to which he or she may be entitled under any law administered by VA. An individual suffering from spina bifida is entitled to only one monthly allowance under this section, even if the individual's biological father and mother are or were both Vietnam veterans or veterans with covered service in Korea.

(b) [Removed and reserved]

(c) *Definitions.*

(1) *Vietnam veteran.* For the purposes of this section, the term “Vietnam veteran” means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to the characterization of the person’s service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Covered service in Korea.* For the purposes of this section, the term “veteran with covered service in Korea” means a person who served in the active military, naval, or air service in or near the Korean DMZ between September 1, 1967, and August 31, 1971, and who is determined by VA, in consultation with the Department of Defense, to have been exposed to an herbicide agent during such service. Exposure to an herbicide agent will be conceded if the veteran served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(3) *Individual.* For the purposes of this section, the term “individual” means a person, regardless of age or marital status, whose biological father or mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era, or whose biological father or mother is or was a veteran with covered service in Korea and who was conceived after the date on which the veteran first had covered service in Korea as defined in this section. Notwithstanding the provisions of §3.204(a)(1), VA will require the types of evidence specified in §§3.209 and 3.210 sufficient to establish in the judgment of the Secretary that a person is the biological son or daughter of a Vietnam veteran or a veteran with covered service in Korea.

(4) *Spina bifida.* For the purposes of this section, the term “spina bifida” means any form and manifestation of spina bifida except spina bifida occulta.

(d) *Disability evaluations.*

(1) Except as otherwise specified in this paragraph, VA will determine the level of payment as follows:

(i) *Level I.* The individual walks without braces or other external support as his or her primary means of mobility in the community, has no sensory or motor impairment of the upper extremities, has an IQ of 90 or higher, and is continent of urine and feces without the use of medication or other means to control incontinence.

(ii) *Level II.* Provided that none of the disabilities is severe enough to warrant payment at Level III, and the individual: walks with braces or other external support as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities, but is able to grasp pen, feed self, and perform self care; or, has an IQ of at least 70 but less than 90; or, requires medication or other means to control the effects of urinary bladder impairment and no more than two times per week is unable to remain dry for at least three hours at a time during waking hours; or, requires bowel management techniques or other treatment to control the effects of bowel impairment but does not have fecal leakage severe or frequent enough to require wearing of absorbent materials at least four days a week; or, has a colostomy that does not require wearing a bag.

(iii) *Level III.* The individual uses a wheelchair as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities severe enough to prevent grasping a pen, feeding self, and performing self care; or, has an IQ of 69 or less; or, despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for three hours at a time during waking hours; or, despite bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage severe or frequent enough to require wearing of absorbent materials at least four days a week; or, regularly requires manual evacuation or digital stimulation to empty the bowel; or, has a colostomy that requires wearing a bag.

(2) If an individual who would otherwise be paid at Level I or II has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida, or from treatment procedures for spina bifida, the Director of the Compensation Service may increase the monthly payment to the level that, in his or her judgment, best represents the extent to which the disabilities resulting from spina bifida limit the individual's ability to engage in ordinary day-to-day activities, including activities outside the home. A Level II or Level III payment will be awarded depending on whether the effects of a disability are of equivalent severity to the effects specified under Level II or Level III.

(3) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purpose of rating spina bifida claims without further examination, provided the statements or reports are adequate for assessing the level of disability due to spina bifida under the provisions of paragraph (d)(1) of this section. In the absence of adequate medical information, VA will schedule an examination for the purpose of assessing the level of disability.

(4) VA will pay an individual eligible for a monetary allowance due to spina bifida at Level I unless or until it receives medical evidence supporting a higher payment. When required to reassess the level of disability under paragraph (d)(5) or (d)(6) of this section, VA will pay an individual eligible for this monetary allowance at Level I in the absence of evidence

3.814-3 §3.814—Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran or a veteran with covered service in Korea **3.814-3**

adequate to support a higher level of disability or if the individual fails to report, without good cause, for a scheduled examination. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.

(5) VA will pay individuals under the age of one year at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the individual from ambulating, grasping a pen, feeding himself or herself, performing self care, or from achieving urinary or fecal continence. If any of those deficits are present, VA will pay the individual at Level III. In either case, VA will reassess the level of disability when the individual reaches the age of one year.

(6) VA will reassess the level of payment whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it must reassess the level of payment at least every five years.

(e) *Effective dates.* Except as otherwise provided, VA will award the monetary allowance for an individual suffering from spina bifida based on an original claim, a claim reopened after final disallowance, or a claim for increase as of the date VA received the claim (or the date of birth if the claim is received within 1 year of that date) or the date entitlement arose, whichever is later.

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If a claimant reopens a previously disallowed claim based on corrected military records, VA will award the benefit from the latest of the following dates: the date the veteran or beneficiary applied for a correction of the military records; the date the disallowed claim was filed; or, the date one year before the date of receipt of the reopened claim.

(f) *Reductions and discontinuances.* VA will generally reduce or discontinue awards according to the facts found except as provided in §§3.105 and 3.114(b).

(1) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the effective date of the erroneous award.

(2) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(Authority: 38 U.S.C. 501, 1805, 1811, 1812, 1821, 1831, 1832, 1833, 1834, 5101, 5110, 5111, 5112)

Cross Reference: 38 CFR 3.307(a)(6)(iv).

[62 FR 51279, Sept. 30, 1997, as amended at 65 FR 35282, June 2, 2000; 66 FR 13436, Mar. 6, 2001; 67 FR 49587, July 31, 2002; 76 FR 4248, Jan. 25, 2011; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlights* references: 31(1), 42(1), 44(1), 54(2), 95(1), 107(1).

§3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.

(a) *Monthly monetary allowance.*

(1) *General.* VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for an individual whose biological mother is or was a Vietnam veteran and who VA has determined to have disability resulting from one or more covered birth defects. Except as provided in paragraph (a)(3) of this section, the amount of the monetary allowance paid will be based upon the level of such disability suffered by the individual, as determined in accordance with the provisions of paragraph (e) of this section.

(2) *Affirmative evidence of cause other than mother's service during Vietnam era.* No monetary allowance will be provided under this section based on a particular birth defect of an individual in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of the individual's mother during the Vietnam era and, in determining the level of disability for an individual with more than one birth defect, the particular defect resulting from other causes will be excluded from consideration. This will not prevent VA from paying a monetary allowance under this section for other birth defects.

(3) *Nonduplication; spina bifida.* In the case of an individual whose only covered birth defect is spina bifida, a monetary allowance will be paid under §3.814, and not under this section, nor will the individual be evaluated for disability under this section. In the case of an individual who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under this section and the amount of the monetary allowance will be not less than the amount the individual would receive if his or her only covered birth defect were spina bifida. If, but for the individual's one or more additional covered birth defects, the monetary allowance payable to or for the individual would be based on an evaluation at Level I, II, or III, respectively, under §3.814(d), the evaluation of the individual's level of disability under paragraph (e) of this section will be not less than Level II, III, or IV, respectively.

(b) *No effect on other VA benefits.* Receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the individual, or the right of any person based on the individual's relationship to that person, to receive any other benefit to which the individual, or that person, may be entitled under any law administered by VA.

(c) *Definitions.*

(1) *Vietnam veteran.* For the purposes of this section, the term *Vietnam veteran* means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Individual*. For the purposes of this section, the term individual means a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Notwithstanding the provisions of §3.204(a)(1), VA will require the types of evidence specified in §§3.209 and 3.210 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) *Covered birth defect*. For the purposes of this section, the term *covered birth defect* means any birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that has resulted, or may result, in permanent physical or mental disability. However, the term covered birth defect does not include a condition due to a:

- (i) Familial disorder;
- (ii) Birth-related injury; or
- (iii) Fetal or neonatal infirmity with well-established causes.

(d) *Identification of covered birth defects*. All birth defects that are not excluded under the provisions of this paragraph are covered birth defects.

(1) Covered birth defects include, but are not limited to, the following (however, if a birth defect is determined to be familial in a particular family, it will not be a covered birth defect):

- (i) Achondroplasia;
- (ii) Cleft lip and cleft palate;
- (iii) Congenital heart disease;
- (iv) Congenital talipes equinovarus (clubfoot);
- (v) Esophageal and intestinal atresia;
- (vi) Hallerman-Streiff syndrome;
- (vii) Hip dysplasia;
- (viii) Hirschprung's disease (congenital megacolon);
- (ix) Hydrocephalus due to aqueductal stenosis;
- (x) Hypospadias;
- (xi) Imperforate anus;
- (xii) Neural tube defects (including spina bifida, encephalocele, and anencephaly);
- (xiii) Poland syndrome;
- (xiv) Pyloric stenosis;
- (xv) Syndactyly (fused digits);
- (xvi) Tracheoesophageal fistula;
- (xvii) Undescended testicle; and
- (xviii) Williams syndrome.

(2) Birth defects that are familial disorders, including hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following, unless the birth defect is not familial in a particular family:

- (i) Albinism;
- (ii) Alpha-antitrypsin deficiency;
- (iii) Crouzon syndrome;
- (iv) Cystic fibrosis;
- (v) Duchenne's muscular dystrophy;
- (vi) Galactosemia;
- (vii) Hemophilia;
- (viii) Huntington's disease;
- (ix) Hurler syndrome;
- (x) Kartagener's syndrome (Primary Ciliary Dyskinesia);
- (xi) Marfan syndrome;
- (xii) Neurofibromatosis;
- (xiii) Osteogenesis imperfecta;
- (xiv) Pectus excavatum;
- (xv) Phenylketonuria;
- (xvi) Sickle cell disease;
- (xvii) Tay-Sachs disease;
- (xviii) Thalassemia; and
- (xix) Wilson's disease.

(3) Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following:

- (i) Medulloblastoma;
- (ii) Neuroblastoma;
- (iii) Retinoblastoma;
- (iv) Teratoma; and
- (v) Wilm's tumor.

(4) Conditions that are chromosomal disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Down syndrome and other Trisomies;
- (ii) Fragile X syndrome;
- (iii) Klinefelter's syndrome; and
- (iv) Turner's syndrome.

(5) Conditions that are due to birth-related injury are not covered birth defects. These include, but are not limited to, the following:

- (i) Brain damage due to anoxia during or around time of birth;
- (ii) Cerebral palsy due to birth trauma;
- (iii) Facial nerve palsy or other peripheral nerve injury;
- (iv) Fractured clavicle; and
- (v) Horner's syndrome due to forceful manipulation during birth.

(6) Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following:

- (i) Asthma and other allergies;
- (ii) Effects of maternal infection during pregnancy, including but not limited to, maternal rubella, toxoplasmosis, or syphilis;
- (iii) Fetal alcohol syndrome or fetal effects of maternal drug use;
- (iv) Hyaline membrane disease;
- (v) Maternal-infant blood incompatibility;
- (vi) Neonatal infections;
- (vii) Neonatal jaundice;
- (viii) Post-infancy deafness/hearing impairment (onset after the age of one year);
- (ix) Prematurity; and
- (x) Refractive disorders of the eye.

(7) Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Attention deficit disorder;
- (ii) Autism;
- (iii) Epilepsy diagnosed after infancy (after the age of one year);
- (iv) Learning disorders; and
- (v) Mental retardation (unless part of a syndrome that is a covered birth defect).

(8) Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to:

- (i) Conditions rendered non-disabling through treatment;
- (ii) Congenital heart problems surgically corrected or resolved without disabling residuals;
- (iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;
- (iv) Hemangiomas that have resolved with or without treatment; and
- (v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

(e) *Disability evaluations.* Whenever VA determines, upon receipt of competent medical evidence, that an individual has one or more covered birth defects, VA will determine the level of disability currently resulting, in combination, from the covered birth defects and associated disabilities. No monetary allowance will be payable under this section if VA determines under this paragraph that an individual has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section are for application. Except as otherwise provided in paragraph (a)(3) of this section, VA will determine the level of disability as follows:

(1) *Levels of disability.*

(i) *Level 0.* The individual has no current disability resulting from covered birth defects.

(ii) *Level I.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or

(B) The individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iii) *Level II.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or

(B) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iv) *Level III.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The individual's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or

(D) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(v) *Level IV.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual's communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for age; or

(C) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(2) *Assessing limitation of daily activities.* Physical or mental effects on the following functions are to be considered in assessing limitation of daily activities:

- (i) Mobility (ability to stand and walk, including balance and coordination);
- (ii) Manual dexterity;
- (iii) Stamina;
- (iv) Speech;
- (v) Hearing;
- (vi) Vision (other than correctable refraction errors);
- (vii) Memory;
- (viii) Ability to concentrate;
- (ix) Appropriateness of behavior; and
- (x) Urinary and fecal continence.

(f) *Information for determining whether individuals have covered birth defects and rating disability levels.*

(1) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purposes of determining whether an individual has a covered birth defect and for rating claims for covered birth defects. If they are adequate for such purposes, VA may make the determination and rating without further examination. In the absence of adequate information, VA may schedule examinations for the purpose of determining whether an individual has a covered birth defect and/or assessing the level of disability.

(2) Except in accordance with paragraph (a)(3) of this section, VA will not pay a monthly monetary allowance unless or until VA is able to obtain medical evidence adequate to determine that an individual has a covered birth defect and adequate to assess the level of disability due to covered birth defects.

(g) *Redeterminations.* VA will reassess a determination under this section whenever it receives evidence indicating that a change is warranted.

(h) *Referrals.* If a regional office is unclear in any case as to whether a condition is a covered birth defect, it may refer the issue to the Director of the Compensation Service for determination.

(i) *Effective dates.* Except as provided in §3.114(a) or paragraph (i)(1) or (2) of this section, VA will award the monetary allowance under subchapter II of 38 U.S.C. chapter 18, for an individual with disability resulting from one or more covered birth defects, based on an

original claim, a claim reopened after final disallowance, or a claim for increase, as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is latest. Subject to the condition that no benefits may be paid for any period prior to December 1, 2001:

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If a claimant reopens a previously disallowed claim based on corrected military records, VA will award the benefit from the latest of the following dates: the date the veteran or beneficiary applied for a correction of the military records; the date the disallowed claim was filed; or, the date one year before the date of receipt of the reopened claim.

(j) *Reductions and discontinuances.* VA will generally reduce or discontinue awards under subchapter II of 38 U.S.C. chapter 18 according to the facts found except as provided in §§3.105 and 3.114(b).

(1) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the effective date of the erroneous award.

(2) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(Authority: 38 U.S.C. 501, 1811, 1812, 1813, 1814, 1815, 1816, 1831, 1832, 1833, 1834, 5101, 5110, 5111, 5112)

[67 FR 49587, July 31, 2002; 76 FR 4249, Jan. 25, 2011; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlights* references: 54(2), 95(1), 107(1).

§3.905 Declaration of forfeiture or remission of forfeiture.

(a) *Jurisdiction.* At the regional office level, except in VA Regional Office, Manila, Philippines, the Regional Counsel is authorized to determine whether the evidence warrants formal consideration as to forfeiture. In the Manila Regional Office the Veterans Service Center Manager is authorized to make this determination. Submissions may also be made by the director of a service, the Chairman, Board of Veterans Appeals, and the General Counsel. Jurisdiction to determine whether the claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture is vested in the Director, Compensation Service, and the Director, Pension and Fiduciary Service, and personnel to whom authority has been delegated under the provisions of §3.100(c).

(b) *Fraud or treasonable acts.* Forfeiture of benefits under §3.901 or §3.902 will not be declared until the person has been notified by the Regional Counsel or, in VA Regional Office, Manila, Philippines, the Veterans Service Center Manager, of the right to present a defense. Such notice shall consist of a written statement sent to the person's latest address of record setting forth the following:

(1) The specific charges against the person;

(2) A detailed statement of the evidence supporting the charges, subject to regulatory limitations on disclosure of information;

(3) Citation and discussion of the applicable statute;

(4) The right to submit a statement or evidence within 60 days, either to rebut the charges or to explain the person's position;

(5) The right to a hearing within 60 days, with representation by counsel of the person's own choosing, that fees for the representation are limited in accordance with 38 U.S.C. 5904(c) and that no expenses incurred by a claimant, counsel or witness will be paid by VA.

(c) *Subversive activities.* Automatic forfeiture of benefits under §3.903 will be effectuated by an official authorized to declare a forfeiture as provided in paragraph (a) of this section.

(d) *Finality of decisions.* A decision of forfeiture is subject to the provisions of §3.104(a) and §§20.1103 and 20.1104 of this chapter. The officials authorized to file administrative appeals and the time limit for filing such appeals are set forth in §19.51 of this chapter.

(e) *Remission of forfeiture.* In event of remission of forfeiture under §3.901(e), any amounts paid as an apportionment(s) during periods of the previously forfeited beneficiary's reentitlement will be offset.

[28 FR 2234, Mar. 7, 1963, as amended at 29 FR 7547, June 12, 1964; 37 FR 19134, Sept. 19, 1972; 39 FR 13970, Apr. 19, 1974; 53 FR 17934, May 19, 1988; 58 FR 32443, June 10, 1993; 61 FR 7216, Feb. 27, 1996; 67 FR 46868, July 17, 2002; 79 FR 2100, Jan. 13, 2014]

Cross references: Effective dates; forfeiture. See §3.400(m). Reductions and discontinuances; fraud. See §3.500(k). Reductions and discontinuances; treasonable acts or subversive activities. See §3.500(s). Adjustments and resumptions. See §3.669. Burial benefits. See §3.1609.

Supplement *Highlights* references: 8(1), 107(1)

Next Section is §3.950