

of the month prior to the month of death. See 38 U.S.C. 5112(b)(1).) Under section 5310(a), if a surviving spouse is entitled to certain death benefits for the month of the veteran's death, the amount of benefits payable for that month "shall be not less" than the amount of compensation or pension the veteran would have received if he or she had not died.

VA has implemented the provisions of section 5111(c)(1) at 38 CFR 3.20(b) and 3.31(c)(1). In a recent opinion (VAOPGCPREC 10-98), VA's General Counsel pointed out that language in 38 CFR 3.20(b) is inconsistent with 38 U.S.C. 5111(c)(1). Section 5111(c)(1) provides, with respect to payments under section 5310, that payment for the first calendar month of entitlement is prohibited only if the amount of DIC or death pension payable exceeds the amount of compensation or pension that would have been payable to the veteran. Section 3.20(b), however, provides that payment for the first calendar month is permitted only if the amount of compensation or pension that would have been payable to the veteran exceeds the amount of DIC or death pension payable. These two provisions give different results if the amount of DIC or death pension payable equals the amount of compensation or pension that would have been payable to the veteran. In this situation, the statute would allow payment for the month of death, but the regulation would not. To that extent, 38 CFR 3.20(b) is inconsistent with section 5111(c)(1) of the statute.

Accordingly, we are amending § 3.20(b) to make it consistent with the statute. It now provides that a surviving spouse may receive payment for the month of the veteran's death if the veteran's rate of benefits is equal to or greater than the rate of death pension or DIC payable to the surviving spouse.

This final rule simply corrects VA regulations to reflect statutory requirements. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Because no notice of proposed rule making was required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (5 U.S.C. 601-612). Even so, the Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act.

The Catalog of Federal Domestic Assistance program numbers are 64.105 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: May 21, 1999.

Togo D. West, Jr.,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§ 3.20 [Amended]

2. In § 3.20, the first sentence of paragraph (b) is amended by adding "equal to or" immediately after "if such rate is".

[FR Doc. 99-14141 Filed 6-7-99; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 4

RIN 2900-AH41

Service Connection Of Dental Conditions For Treatment Purposes

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs adjudication regulations for determining whether dental conditions are service-connected for purposes of eligibility for outpatient dental treatment. This amendment clarifies requirements for service connection of dental conditions and provides that VA will consider certain dental conditions service-connected for treatment purposes if they are shown in service after a period of 180 days.

DATES: *Effective Date:* June 8, 1999.

FOR FURTHER INFORMATION CONTACT: Lorna Fox, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 273-7223.

SUPPLEMENTARY INFORMATION: On February 24, 1997, VA published in the

Federal Register (62 FR 8201), a proposal to amend those sections of 38 CFR part 3 and part 4 that govern whether dental conditions are service-connected for purposes of eligibility for outpatient dental treatment under 38 U.S.C. 1712 (implemented by 38 CFR 17.161). Interested persons were invited to submit written comments, suggestions or objections. We received comments from Paralyzed Veterans of America and one individual.

Section 1712 of 38 U.S.C. states that veterans with noncompensable service-connected dental conditions are entitled to a one-time correction of the dental conditions by VA under certain circumstances. VA regulations at 38 CFR 3.381 and 3.382 previously stated that for purposes of outpatient dental treatment, service connection for certain noncompensable dental conditions is warranted only if the conditions are shown after a "reasonable period of service." We proposed to replace the subjective term "reasonable period of service" with the objective requirement of 180 days or more of active service.

One commenter stated that a 180 day requirement "seems to clash significantly" with both 38 U.S.C. 1111, which requires VA to consider every veteran to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at the time, and § 1153, which requires VA to consider preexisting injury or disease to have been aggravated by active military service where there is an increase in disability during such service that was not due to the natural progress of the disease. Section 1111 states that "[f]or the purposes of section 1110 of this title," the presumption of soundness shall apply. Section 1110 of title 38, United States Code, applies to payment of compensation for disability. Section 1111 is therefore not applicable to determining eligibility for outpatient dental treatment under 38 U.S.C. 1712. In addition, section 1153 of title 38, United States Code, applies only to disabilities. Because noncompensable dental conditions are not considered to be disabilities (see former 38 CFR 4.149) section 1153 is also not applicable to 38 U.S.C. 1712 determinations. Therefore, we make no change based on this comment. We acknowledge that in the notice of proposed rulemaking, we stated that, for purposes of consistency with 38 CFR 3.304(b), VA was proposing to delete 38 CFR 3.381(d), which stated that the presumption of soundness does not apply to noncompensable dental conditions. 62 FR 8201, 8202 (1997). Notwithstanding this statement, as explained above,

based upon the plain language of 38 U.S.C. 1110 and 1111, we do not believe that the presumption of soundness is applicable to determinations of service connection under § 3.381.

The commenter also states that VA has extended "even further the 'reasonable period of service' requirement established in the (Court of Veterans Appeals) *Manio* decision which held, in essence, that 120 days, not 180 days as proposed, was sufficient to meet that requirement." As explained in the notice of proposed rulemaking, the Court of Veterans Appeals held in *Manio v. Derwinski*, 1 Vet. App. 140 (1991), that four months satisfied the reasonable-period-of-service requirement "under the facts of that case." 62 FR 8202. In our view, 180 days better defines the former reasonable-period-of-service requirement than 120 days. In fact, we possibly could have further lengthened the period since, as stated in the proposal "[d]ental caries and other dental pathology take time to develop, often a year or two in permanent teeth" (62 FR 8202). Even so, we believe the 180 days is reasonable. This also is consistent with the fact that the Academy of General Dentistry recommends that a patient visit a dentist at least every six months so that the dentist can monitor the patient's oral health and help prevent problems from arising. Under these circumstances, it is more likely than not that caries or pathology which become apparent within the first 180 days of service pre-existed that service.

Another commenter stated that VA should amend the eligibility rules to allow outpatient dental care for veterans with wartime service who are receiving long-term nursing home care without regard to other eligibility requirements. While we sympathize with the health care needs of veterans receiving nursing care, the eligibility criteria for outpatient dental care are specified in 38 U.S.C. 1712, which contains no provision regarding eligibility based on nursing home care. Since we are not free to create by regulation eligibility that is not authorized by statute, we make no change based on this comment.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted without change.

The Secretary hereby certifies that this proposed amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA

beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), the proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance program numbers are 64.104, 64.105, 64.109 and 64.110.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability Benefits, Health care, Pensions, Veterans.

38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: April 21, 1999.

Togo D. West, Jr.,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Section 3.381 is revised to read as follows:

§ 3.381 Service connection of dental conditions for treatment purposes.

(a) Treatable carious teeth, replaceable missing teeth, dental or alveolar abscesses, and periodontal disease will be considered service-connected solely for the purpose of establishing eligibility for outpatient dental treatment as provided in § 17.161 of this chapter.

(b) The rating activity will consider each defective or missing tooth and each disease of the teeth and periodontal tissues separately to determine whether the condition was incurred or aggravated in line of duty during active service. When applicable, the rating activity will determine whether the condition is due to combat or other in-service trauma, or whether the veteran was interned as a prisoner of war.

(c) In determining service connection, the condition of teeth and periodontal tissues at the time of entry into active duty will be considered. Treatment during service, including filling or extraction of a tooth, or placement of a prosthesis, will not be considered evidence of aggravation of a condition that was noted at entry, unless

additional pathology developed after 180 days or more of active service.

(d) The following principles apply to dental conditions noted at entry and treated during service:

(1) Teeth noted as normal at entry will be service-connected if they were filled or extracted after 180 days or more of active service.

(2) Teeth noted as filled at entry will be service-connected if they were extracted, or if the existing filling was replaced, after 180 days or more of active service.

(3) Teeth noted as carious but restorable at entry will not be service-connected on the basis that they were filled during service. However, new caries that developed 180 days or more after such a tooth was filled will be service-connected.

(4) Teeth noted as carious but restorable at entry, whether or not filled, will be service-connected if extraction was required after 180 days or more of active service.

(5) Teeth noted at entry as non-restorable will not be service-connected, regardless of treatment during service.

(6) Teeth noted as missing at entry will not be service connected, regardless of treatment during service.

(e) The following will not be considered service-connected for treatment purposes:

(1) Calculus;

(2) Acute periodontal disease;

(3) Third molars, unless disease or pathology of the tooth developed after 180 days or more of active service, or was due to combat or in-service trauma; and

(4) Impacted or malposed teeth, and other developmental defects, unless disease or pathology of these teeth developed after 180 days or more of active service.

(f) Teeth extracted because of chronic periodontal disease will be service-connected only if they were extracted after 180 days or more of active service.

(Authority: 38 U.S.C. 1712)

§ 3.382 [Removed and Reserved]

3. Section 3.382 is removed and reserved.

PART 4—SCHEDULE FOR RATING DISABILITIES

4. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

§ 4.149 [Removed and Reserved]

5. Section 4.149 is removed and reserved.

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