

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 5

RIN 2900-AL71

#### Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations relating to accrued benefits, death compensation, and certain special rules applicable upon the death of a VA beneficiary and to relocate them in a new part of the Code of Federal Regulations (CFR). We propose to reorganize these regulations in a more logical order, add new section and paragraph headings, rewrite certain sections, divide certain sections into two or more separate new regulations, and add changes required by relevant court decisions and by the Veterans Benefits Act of 2003.

**DATES:** Comments must be received by VA on or before November 30, 2004.

**ADDRESSES:** Written comments may be submitted by: Mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to [VAregulations@mail.va.gov](mailto:VAregulations@mail.va.gov); or, through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AL71." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Bill Russo, Chief, Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515.

**SUPPLEMENTARY INFORMATION:** The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management (ORPM) to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 "VA Claims Processing Task

Force: Report to the Secretary of Veterans Affairs." The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the regulations in 38 CFR part 3 governing the Compensation and Pension (C&P) program of the Veterans Benefits Administration (VBA). These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed regulations concerning accrued benefits, benefits awarded but unpaid at death, death compensation, the disposition of the proceeds of certain VA benefits upon the death of the person receiving those benefits, and effective dates applicable to various death benefits.

#### Outline

Overview of New Part 5 Organization  
Overview of Proposed Subpart G

Organization  
Table Comparing Current Part 3 Rules With  
Proposed Part 5 Rules  
Content of Proposed Rules

#### Accrued Benefits

- 5.550 Definitions.
- 5.551 Persons entitled to accrued benefits or benefits awarded, but unpaid at death.
- 5.552 Claims for accrued benefits or benefits awarded, but unpaid at death.
- 5.553 Notice of incomplete claims.
- 5.554 Evidence of school attendance in claims by a veteran's children for accrued benefits or benefits awarded, but unpaid at death.
- 5.555 What VA benefits are potentially payable as accrued benefits or benefits awarded, but unpaid at death?
- 5.556 Period for which accrued benefits are paid.
- 5.557 Relationship between accrued benefits claim and claims filed by the deceased beneficiary.
- 5.558 Special rule for certain cases involving deaths prior to December 16, 2003.
- 5.559 Accrued benefits reference table.

#### Death Compensation

- 5.560 Eligibility criteria for payment of death compensation.
- 5.561 Time of marriage requirements for death compensation claims.
- 5.562 Eligibility criteria for special monthly death compensation.

#### Special Provisions

- 5.563 Special rules when a beneficiary dies while receiving apportioned benefits.

5.564 Special rules when VA benefit checks have not been negotiated prior to the beneficiary's death.

5.565 Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.

5.566 Special rules for payment of gratuitous VA benefits deposited in a personal funds of patients account when an incompetent veteran dies.

#### Effective Dates

- 5.567 Effective dates for DIC or death compensation awards.
- 5.568 Effective date for discontinuance of DIC or death compensation payments to a person no longer recognized as the veteran's surviving spouse.
- 5.569 Effective date for award, or termination of award, of DIC or death compensation to a surviving spouse where DIC or death compensation payments to children are involved.
- 5.570 Effective date for reduction in DIC—surviving spouses.
- 5.571 Effective date for an award or increased rate based on amended income information—parents' DIC.
- 5.572 Effective dates for reduction or discontinuance based on increased income—parents' DIC.

Removal of 38 CFR 3.400(h) and 3.503(a)(9).  
Endnote Regarding Removals (Deletions)

From Part 3 of 38 CFR  
Paperwork Reduction Act  
Regulatory Flexibility Act  
Executive Order 12866  
Unfunded Mandates  
Catalog of Federal Domestic Assistance  
Numbers

List of Subjects in 38 CFR Part 5

#### Overview of New Part 5 Organization

We plan to remove the compensation and pension benefit regulations from 38 CFR part 3 and relocate them in new part 5. We also plan to reorganize the regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this reorganization will allow claimants and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly.

The first major subdivision is "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part.

"Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements.

This subpart was published as proposed on January 30, 2004. See 69 FR 4820.

“Subpart C—Adjudicative Process, General” would inform readers about types of claims and filing procedures, VA’s duties, rights and responsibilities of claimants, and general effective dates, as well as revision of decisions and protection of VA ratings.

“Subpart D—Dependents of Veterans” would provide information about how VA determines whether an individual is a dependent and the evidence requirements for such determinations.

“Subpart E—Claims for Service Connection and Disability Compensation” would define service-connected compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain provisions governing presumptions related to service connection, disability rating principles, and effective dates, as well as several special ratings.

“Subpart F—Nonservice-Connected Disability and Death Pensions” would include information regarding the three types of nonservice-connected pension: Improved pension, Old law pension, and Section 306 pension. This subpart would also include those provisions that state how to establish entitlement for pension, where applicable, and the effective dates governing each pension.

“Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary” would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. The portion concerning accrued benefits, death compensation benefits, special rules applicable on death of a beneficiary, and effective dates is the subject of this document.

“Subpart H—Special Benefits for Veterans, Dependents, and Survivors” would pertain to ancillary and special benefits available, including benefits for children with various birth defects.

“Subpart I—Benefits for Certain Filipino Veterans and Survivors” would pertain to the various benefits available to Filipino veterans.

“Subpart J—Burial Benefits” would pertain to burial allowances.

“Subpart K—Matters Affecting Receipt of Benefits” would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.

“Subpart L—Regulations Related to Payments and Adjustments to Payments” would include general rate-setting rules, several adjustment and resumption regulations, and election of benefit rules.

The final subpart, “Subpart M—Apportionments and Payments to Fiduciaries or Incarcerated Beneficiaries,” would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this Notice of Proposed Rulemaking (NPRM) cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also cite the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 replacement in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 replacement has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted “[regulation that will be published in a future Notice of Proposed Rulemaking]” in the place where the part 5 regulation citation would be placed.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both NPRM’s. VA will provide a separate opportunity for public comment on each segment of the proposed part 5 regulations before adopting a final version of part 5.

#### Overview of Proposed Subpart G Organization

This NPRM pertains to those regulations governing accrued benefits, death compensation, special rules applicable upon death of a beneficiary and, with regard to effective dates only, DIC benefits. These regulations would be contained in proposed Subpart G of new 38 CFR part 5. While these regulations have been substantially

restructured and rewritten for greater clarity and ease of use, many of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, we also propose substantive changes, including those stemming from relevant court decisions and from provisions of the Veterans Benefits Act of 2003.

#### Table Comparing Current Part 3 Rules With Proposed Part 5 Rules.

The following table shows the correspondence between the current regulations in part 3 and those proposed regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or “New”)
5.550(a) .....	3.1000(a).
5.550(b) .....	New.
5.550(c) .....	3.1000(d)(2).
5.550(d) .....	New.
5.550(e) .....	New.
5.550(f) .....	3.1000(d)(3).
5.550(g) .....	3.1000(d)(4).
5.550(h) .....	3.1000(d)(1).
5.551(a) .....	New.
5.551(b) .....	3.1000(a)(1).
5.551(c) .....	3.1000(a)(2), (f).
5.551(d) .....	3.1000(d)(2).
5.551(e) .....	3.1000(a)(4), 3.1002.
5.551(f) .....	3.1000(c)(2).
5.552(a) .....	New.
5.552(b) and (c) .....	3.1000(c).
5.553 .....	3.1000(c)(1).
5.554 .....	3.667(e).
5.555 .....	3.1000(e) through (h), 3.803(d).
5.556(a) .....	3.1000(a).
5.556(b) .....	New.
5.557 .....	New.
5.558 .....	New.
5.559 .....	New.
5.560(a) .....	3.4(a).
5.560(b) .....	3.4(c)(1).
5.560(c) .....	3.5(d).
5.560(d) .....	New.
5.561(a) .....	Introduction to 3.54.
5.561(b) and (c), except for (c)(1).	3.54(b).
5.561(c)(1) .....	3.54(b) and (e).
5.562(a) .....	3.351(a)(6), (b), and (c).
5.562(b) .....	3.351(c).
5.563 .....	3.1000(b).
5.564(a)(1) .....	Introduction to 3.1003 and 3.1003(a).
5.564(a)(2) .....	New.
5.564(b) .....	3.1003(a)(1).
5.564(c) .....	3.1003(a)(2).
5.564(d) .....	3.1003(b).
5.564(e) .....	3.1003(c).
5.565(a) through (d)(1).	New.
5.565(d)(2) .....	3.1008.
5.566(a) .....	Introduction to 3.1009.
5.566(b) and (c) .....	New.
5.566(d) .....	3.1009(a).
5.566(e) .....	3.1009(b).

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or "New")
5.567(a) .....	3.400(c)(1).
5.567(b) .....	3.400(c)(2).
5.567(c) .....	3.400(c)(4)(i).
5.567(d) .....	3.400(c)(4)(ii).
5.567(e) .....	3.402(a).
5.568(a) .....	Introduction to 3.657.
5.568(b)(1) .....	3.657(a)(1).
5.568(b)(2) .....	3.657(a)(2).
5.568(b)(3) .....	New.
5.569(a) .....	Introduction to 3.657.
5.569(b) .....	3.657(b)(1).
5.569(c)(1) and (2) .....	3.657(b)(2).
5.569(c)(3) .....	New.
5.570(a) .....	Introduction to 3.502.
5.570(b)(1) .....	3.502(a)(1).
5.570(b)(2) .....	3.502(a)(2).
5.570(c) .....	3.502(b).
5.571(a) .....	3.660(b)(1).
5.571(b) .....	3.660(b)(2).
5.571(c) .....	3.660(b) introduction.
5.572(a) and (b) .....	3.660(a)(2) second sentence.
5.572(c) .....	New.
5.572(d) .....	3.660(a)(3).

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section affected by these proposed regulations is accounted for in the table. In some instances other portions of the part 3 sections that are contained in these proposed regulations appear in subparts of part 5 that will be published for public comment at a later time. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a future NPRM. The table also does not include material from the current sections that will be removed from part 3 and not carried forward to part 5. A listing of material VA proposes to remove from part 3 appears later in this document.

## Content of Proposed Rules

### Accrued Benefits

#### 5.550 Definitions

The first proposed regulation, § 5.550, defines "accrued benefits" and other terms important in determining entitlement to benefits under 38 U.S.C. 5121, "Payment of certain accrued benefits upon death of a beneficiary." These proposed definitions are influenced by court opinions relating to benefits for survivors under 38 U.S.C. 5121 and by changes to 38 U.S.C. 5121

made by section 104 of the Veterans Benefits Act of 2003 ("the Act"), Pub. L. 108–183, 117 Stat. 2656.

Understanding the complex background of our first two proposed definitions, "accrued benefits" and "benefits awarded, but unpaid at death" is critical to understanding these proposed definitions and other issues in this NPRM.

Prior to its amendment by section 104 of the Act, the introductory portion of 38 U.S.C. 5121(a) read as follows:

Except as provided in sections 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid for a period not to exceed two years, shall, upon the death of such individual be paid as follows. \*\*\*

VA traditionally construed 38 U.S.C. 5121(a) as providing only one type of benefit to survivors: accrued benefits. The United States Court of Appeals for Veterans Claims (CAVC) in *Bonny v. Principi*, 16 Vet. App. 504 (2002) interpreted section 5121(a) differently. The CAVC's analysis includes the following:

The comma in the middle of paragraph (a), between "decisions" and "or," and the use of the conjunction "or" after the comma, indicate that the separated phrases state substantive alternatives. 38 U.S.C. 5121(a). The paragraph provides for payment of (1) periodic monetary benefits to which an individual was entitled at death under existing ratings or decisions, which the Court will call "benefits awarded but unpaid", or (2) periodic monetary benefits based on evidence in the file at the date of an entitled individual's death and due and unpaid for a period not to exceed two years, which are called "accrued benefits" for purposes of sections 5121 and 5122. *Id.*

\* \* \* \* \*

The important distinction between the two types of periodic monetary benefits is that one type of benefits is due to be paid to the veteran at his death and one type is not. As to the former, when the benefits have been awarded but not paid pre-death, an eligible survivor is to receive the entire amount of the award. The right to receive the entire amount of periodic monetary benefits that was awarded to the eligible individual shifts to the eligible survivor when payment of the award was not made before the eligible individual died. This interpretation of 38 U.S.C. 5121(a) is completely consistent with the plain language of the statute, as previously quoted and interpreted herein.

As to the latter type of periodic monetary benefits, what is determinative regarding accrued benefits is that evidence in the individual's file at the date of death supports

a decision in favor of awarding benefits. Because the benefits cannot be awarded to the deceased individual, an eligible survivor can claim a portion of those accrued benefits.

16 Vet. App. at 507–08. The CAVC's analysis recognized two kinds of benefits under 38 U.S.C. 5121, which we propose to call "accrued benefits" and "benefits awarded, but unpaid at death." These terms are defined in § 5.550(a) and (b), respectively, to comply with the court's analysis.

These proposed definitions are also influenced by the Act. Section 104(a) of the Act removed the 2-year limitation on accrued benefits payable under 38 U.S.C. 5121. Section 104(c) of the Act made certain "technical amendments" to 38 U.S.C. 5121, including removal of the comma after "or decisions" in the introductory text of paragraph (a). This is the same comma relied upon by the CAVC in *Bonny* for interpreting 38 U.S.C. 5121 to require a distinction between accrued benefits and benefits awarded, but unpaid at death. Therefore, an important question is whether Congress intended to change the interpretation of 38 U.S.C. 5121 required by the *Bonny* decision by removing this comma. Based on the following analysis, we believe that it did.

The text of section 104 of the Act is identical to the text of a provision in the House bill, H.R. 2297, as amended, 108th Cong. (2003). The "Explanatory Statement on Senate Amendment to House Bill, H.R. 2297, as Amended" notes that the Act reflects a compromise agreement reached by the House and Senate Committees on Veterans' Affairs on provisions of a number of House and Senate bills affecting veterans' benefits. Section 104 of the Act was based on portions of two of these bills, section 6 of H.R. 1460, 108th Cong. (2003), and section 105 of S. 1132, as amended, 108th Cong. (2003). See 149 Cong. Rec. S15,133–34 (daily ed. Nov. 19, 2003).

The removal of the comma in question in 38 U.S.C. 5121(a) comes from section 105(b) of S. 1132, as passed by the Senate. See 149 Cong. Rec. S13,745 (daily ed. Oct. 31, 2003). S. 1132 was also based on a number of other bills, including S. 1188, 108th Cong. (2003). A principal purpose of S. 1188 was to amend 38 U.S.C. 5121 "to repeal the two-year limitation on the payment of accrued benefits that are due and unpaid by the Secretary of Veterans Affairs upon the death of a veteran or other beneficiary under laws administered by the Secretary." 149 Cong. Rec. S7,476 (daily ed. June 5, 2003). As originally drafted, S. 1188 did not include the "technical

amendments” in section 104(c) of the Act.

On July 10, 2003, the Senate Committee on Veterans' Affairs held a hearing on a number of the bills that would become the sources of S. 1132. Persons who testified at that hearing included Daniel L. Cooper, VA's Under Secretary for Benefits, whose statement to the Committee included the following comment concerning S. 1188:

In addition, we note one technical change needed in section 2 of S. 1188 should it be enacted. The comma in current section 5121(a) following “existing ratings or decisions” should be deleted to clarify, for purposes of 38 U.S.C. §§ 5121(b) and (c) and 5122, that the term “accrued benefits” includes both benefits that have been awarded to an individual in existing ratings or decisions but not paid before the individual's death, as well as benefits that could be awarded based on evidence in the file at the date of death.

S. Rep. No. 108–169, at 46–47.

Further, in its discussion of section 105 of S. 1132, the Committee noted that:

At the Committee's hearing on July 10, 2003, Under Secretary Cooper commented as follows: “The distinction the Bonny decision draws between the two categories of claimants—those whose claims had been approved and those whose entitlement had yet to be recognized when they died—is really one without a difference. In either case, a claimant's estate is deprived of the value of benefits to which the claimant was, in life, entitled.”

*Id.* at 8.

Based on this legislative history, we conclude that Congress' purpose in removing the comma from the introductory paragraph of 38 U.S.C. 5121(a) was to provide for only one type of benefit under section 5121, removing the distinction between accrued benefits and benefits awarded, but unpaid at death, that resulted from the *Bonny* decision.

The interplay between *Bonny* and section 104 of the Act is also affected by the fact that different portions of section 104 of the Act became effective at different times. Because there is no specific effective date in the Act for section 104(c) (the “technical amendments” which include removal of the comma that was a basis for the CAVC's interpretation of 38 U.S.C. 5121 in *Bonny*), that portion of the Act became effective when the Act was signed into law on December 16, 2003. On the other hand, under section 104(d) of the Act, the amendment to 38 U.S.C. 5121(a), removing the provision restricting benefits to those that were due and unpaid “for a period not to exceed two years” applies to deaths occurring on or after December 16, 2003.

These factors lead to consideration of what, if any, viability the *Bonny* distinctions between accrued benefits and benefits awarded, but unpaid at death, still have. For the reasons discussed in the following paragraphs, we conclude that these distinctions are still applicable in a very limited number of cases. Particularly because of the differences in effective date provisions for different provisions of section 104 of the Act, sorting this out involves looking at the time line for when the deceased beneficiary died and when claims for 38 U.S.C. 5121 benefits were received and decided. (For purposes of this discussion, “deceased beneficiary” has the meaning we propose in § 5.550(e) (“the deceased person whose VA benefits are being claimed as accrued benefits or benefits awarded, but unpaid at death”).)

Based on the plain language of the Act, we believe the *Bonny* division of 38 U.S.C. 5121 benefits clearly does not apply if the deceased beneficiary died on or after December 16, 2003. Effective on that date, the statutory basis for *Bonny*'s interpretation of 38 U.S.C. 5121 as creating two different types of VA benefits was removed. In any event, there would be little benefit to claimants for preserving the distinction in such cases because the 2-year benefit limitation has been repealed in cases where the deceased beneficiary died on or after December 16, 2003.

For claims filed on or after December 16, 2003, VA must apply 38 U.S.C. 5121 as amended by the Act. However, the 2-year limitation applies to all 38 U.S.C. 5121 accrued benefit claims VA received on or after December 16, 2003, if the deceased beneficiary died before December 16, 2003. This is true because (1) the Act removed the statutory underpinnings of the *Bonny* decision effective on December 16, 2003, but (2) Congress very clearly intended the removal of the 2-year limitation in amended 38 U.S.C. 5121 to be effective only where the deceased beneficiary died on or after December 16, 2003.

The last question is how VA should apply 38 U.S.C. 5121 to those cases where the deceased beneficiary died before December 16, 2003, and a claim for § 5121 benefits was pending on December 16, 2003. For the following reasons, we propose not to apply the Act's amendments in such cases.

VA's General Counsel addressed retroactive application of a statute in VAOPGCPREC 7–2003, holding:

In *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit overruled *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), to the extent it conflicts with the precedents of the

Supreme Court and the Federal Circuit. *Karnas* is inconsistent with Supreme Court and Federal Circuit precedent insofar as *Karnas* provides that, when a statute or regulation changes while a claim is pending before the Department of Veterans Affairs (VA) or a court, whichever version of the statute or regulation is most favorable to the claimant will govern unless the statute or regulation clearly specifies otherwise. Accordingly, that rule adopted in *Karnas* no longer applies in determining whether a new statute or regulation applies to a pending claim. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is enacted or a new regulation is issued while a claim is pending before VA, VA must first determine whether the statute or regulation identifies the types of claims to which it applies. If the statute or regulation is silent, VA must determine whether applying the new provision to claims that were pending when it took effect would produce genuinely retroactive effects. If applying the new provision would produce such retroactive effects, VA ordinarily should not apply the new provision to the claim. If applying the new provision would not produce retroactive effects, VA ordinarily must apply the new provision.

As to the first criterion, the Act does not “identif[y] the types of claims to which it applies.” The question then becomes whether applying the Act's provisions to claims pending before VA on December 16, 2003, would produce a “genuinely retroactive” effect. For the reasons stated below, we believe that it would. Therefore, VA will not apply the Act's amendments to claims for 38 U.S.C. 5121 benefits pending before VA on December 16, 2003.

As discussed at some length in VAOPGCPREC 7–2003, determining whether applying changes in the law would produce a genuinely retroactive effect is a complex undertaking. However, we believe that the principles discussed in the following portion of paragraph 17 of the General Counsel's opinion control the question at hand and call for application of 38 U.S.C. 5121 as it existed prior to the Act to claims pending on December 16, 2003:

[S]tatutes or regulations that restrict the bases for entitlement to a benefit might have disfavored retroactive effects as applied to some claims that were pending when they took effect. For example, if a veteran was entitled to benefits based on the law existing when he or she filed an application with VA, and a restrictive change in the governing law occurs before VA adjudicates the claim, application of the new restriction might retroactively extinguish the claimant's previously existing right to benefits for periods before the new law took effect. In those circumstances, *Landgraf* [v. *USI Film Products*, 511 U.S. 244 (1994)] indicates that the intervening restriction would not apply in determining the claimant's rights for such periods.

Applying the technical amendment to section 5121(a) made by the Act to pending claims would limit the amount of accrued benefits some claimants could receive under *Bonny*. We believe this would constitute a genuine retroactive effect. We propose to amend the regulations so as to avoid such an effect.

Accordingly, we propose to provide in § 5.550(a)(2) and (3) that:

(2) “Accrued benefits” also includes benefits awarded, but unpaid at death:

(i) If the deceased beneficiary died on or after December 16, 2003;

(ii) If the deceased beneficiary died prior to December 16, 2003, but VA received the claim for benefits under 38 U.S.C. 5121 on or after December 16, 2003; and

(iii) For purposes of § 5.558, “Special rule for certain cases involving deaths prior to December 16, 2003.”

(3) “Accrued benefits” does not include benefits awarded, but unpaid at death, when the deceased beneficiary died prior to December 16, 2003, and a claim for benefits under 38 U.S.C. 5121 was pending before VA on December 16, 2003. (For purposes of paragraph (a)(3) of this section, VA will consider a claim to be pending if there was no final decision on that claim as of December 16, 2003. *See* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining a final decision)).

Proposed § 5.550(c) addresses the definition of “child.” Because “child” is defined in great detail in § 3.57, we believe that the material should not be repeated here. Therefore, the definition in proposed § 5.550(c) consists of a simple cross-reference to § 3.57, together with text preserving the intent of the current rule in § 3.1000(d)(2) stating that a “child” includes “an unmarried child over the age of 18 but not over 23 years of age, who was pursuing a course of instruction within the meaning of § 3.57 at the time of the payee’s death.” This is accomplished by reference to “the age range specified by § 3.57(a)(1)(iii).” (Note that current § 3.57(a)(1)(iii) correctly describes the relevant age range while current § 3.1000(d)(2) is potentially misleading in this regard. *See* 38 U.S.C. 101(4)(A)(iii).)

The United States Court of Appeals for the Federal Circuit clarified another aspect of benefits under 38 U.S.C. 5121 in *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998):

Reading [38 U.S.C.] 5101 and 5121 together compels the conclusion that, in order for a surviving spouse to be entitled to accrued benefits, the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision.

Proposed § 5.550(d) defines a “claim for VA benefits pending on the date of death” as “a claim filed with VA which

had not been finally adjudicated by VA on or before the date of death.” That is, VA would consider the claim to have been pending on the date of death if it had not been adjudicated or, if the claim had been adjudicated, the time to appeal had not expired or there is no final decision by the Board of Veterans’ Appeals (BVA).

We note this definition does not preclude a survivor from filing an accrued benefits claim based on a decedent’s claim that had been judicially appealed. In that case, the CAVC typically vacates the BVA decision in order to preserve potential accrued benefits claims. For example, the CAVC noted the following in *Sagnella v. Principi*, 15 Vet. App. 242, 246 (2001):

This Court held in *Landicho v. Brown*, 7 Vet. App. 42 (1994) that the appropriate remedy [when a veteran dies while his or her BVA decision is on appeal] is to vacate the Board decision from which the appeal was taken and to dismiss the appeal. *Landicho*, 7 Vet. App. at 54. This ensures that the Board decision and the underlying VA regional office (RO) decision(s) will have no preclusive effect in the adjudication of any accrued-benefits claims derived from the veteran’s entitlements. It also nullifies the previous merits adjudication by the RO because that decision was subsumed in the Board decision.

Consistent with long-standing VA practice, § 5.550(d) also provides that such a claim may include a deceased beneficiary’s claim to reopen a finally disallowed claim based upon new and material evidence or a deceased beneficiary’s claim of clear and unmistakable error in a prior rating or decision.

Proposed § 5.550(e) defines “deceased beneficiary.” This would provide a convenient way to refer to the deceased VA beneficiary throughout these proposed regulations and to distinguish that person from the living beneficiary claiming survivors’ benefits.

The proposed definitions of “dependent parent” at § 5.550(f) and of “evidence in the file on the date of death” at § 5.550(g) are plain language restatements of the definitions of those terms in current § 3.1000(d).

Next, in § 5.550(h), we propose to replace the definition of “spouse” in current § 3.1000(d)(1) with a definition of “surviving spouse.” Section 3.1000(d)(1) provides that a “spouse” is the surviving spouse of a veteran whose marriage meets the requirements of § 3.1(j) or § 3.52. “Surviving spouse” is defined in § 3.50(b), which also requires compliance with either § 3.1(j) or § 3.52. Therefore, subject to one exception, we propose to define “surviving spouse” by

reference to § 3.50(b). The exception arises because § 3.50(b)(1) imposes a requirement for the surviving spouse to have lived with the veteran continuously from the date of marriage to the date of the veteran’s death, except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse. Section 3.1000(d)(1), in part, specifies that “[w]here the marriage meets the requirements of § 3.1(j) date of marriage and continuous cohabitation are not factors.” In § 5.550(h)(2), we propose to preserve this exception from the § 3.50(b)(1) continuous cohabitation requirements and various potentially applicable date-of-marriage requirements.

#### 5.551 Persons Entitled to Accrued Benefits or Benefits Awarded, but Unpaid at Death

In the next proposed regulation, § 5.551, we propose to recognize the category of “benefits awarded, but unpaid at death,” where appropriate. We also propose to clarify several points.

We propose in § 5.551(a) to state the scope of this section, including cross-references to several special provisions applicable to accrued benefits and benefits awarded, but unpaid at death.

One clarification, in proposed § 5.551(b), concerns the references to the veteran’s spouse, children, and dependent parents in current § 3.1000(a)(1). Proposed § 5.551(b)(2) specifies that this means the surviving spouse, surviving children, and surviving dependent parents. This is not a substantive change. It is implicit in the current regulation and in its authorizing statute (38 U.S.C. 5121(a)(2)), both of which require that the claimants be living.

Proposed § 5.551(c) clarifies provisions of current § 3.1000(f), which provides rules for distributing unpaid dependents’ educational assistance allowance or special restorative training allowance, authorized by 38 U.S.C. chapter 35, when the recipient of those benefits dies. Current § 3.1000(f) contains two different rules concerning distribution of those benefits when the deceased beneficiary is the veteran’s spouse. This is necessary because, under 38 U.S.C. 5121(a), the disposition of benefits differs depending on whether the veteran was or was not living at the time of the death of the veteran’s spouse.

Upon the death of a surviving spouse, the spouse’s benefits go first to the surviving children of the deceased veteran. *See* 38 U.S.C. 5121(a)(3). If there are no surviving children, the

accrued benefits may be paid as necessary to reimburse the person who bore the expense of the last sickness and/or burial of the deceased spouse. See 38 U.S.C. 5121(a)(6). On the other hand, there is no specific rule in 38 U.S.C. 5121(a) for distribution of benefits when the spouse of a living veteran dies. In that case, the default provision of 38 U.S.C. 5121(a)(6) applies and the accrued benefits may be paid only as necessary to reimburse the person who bore the expense of the last sickness and/or burial of the deceased spouse.

We propose to make these distinctions much clearer in § 5.551(c) by using two separate paragraphs. One would be applicable when the deceased beneficiary was the surviving spouse of a deceased veteran, and one would be applicable when the deceased beneficiary was the spouse of a living veteran. In fact, these distinctions would apply generally if the deceased beneficiary was the veteran's spouse, not just in cases involving chapter 35 educational benefits, and that broader application is also reflected in proposed § 5.551(c).

Section 104(b) of the Act amends 38 U.S.C. 5121(a) to provide that surviving parents may claim accrued benefits upon the death of a child who had claimed benefits under 38 U.S.C. chapter 18. Under section 104(d) of the Act, this amendment applies when the child dies on or after December 16, 2003. Proposed § 5.551(d)(3) reflects this change.

A consequence of the *Bonny* decision construing 38 U.S.C. 5121(a) to provide for two different kinds of benefits is that statutory provisions that explicitly apply to only one of those benefits necessarily do not apply to the other. One of those provisions (38 U.S.C. 5121(a)(5) prior to the Act, but now 38 U.S.C. 5121(a)(6)) provides that, if there is no other qualified claimant, "only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of [the deceased beneficiary's] last sickness and burial."

Because it expressly applies to "accrued benefits," it could not, prior to the Act, have applied to the category of benefits recognized by the *Bonny* decision we propose to call "benefits awarded, but unpaid at death." In keeping with the previous discussion of the extent to which *Bonny* is still applicable, we propose to provide in § 5.551(e) that "[b]enefits awarded, but unpaid at death, are not payable under this paragraph if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was

pending before VA on December 16, 2003."

#### *5.552 Claims for Accrued Benefits or Benefits Awarded, but Unpaid at Death*

Proposed § 5.552 provides rules for claims for accrued benefits. These proposed rules also apply to claims for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending on December 16, 2003. Proposed § 5.552(a) clarifies that proposed § 5.552 does not apply to claims for the proceeds of benefit checks a deceased beneficiary failed to negotiate prior to death (see proposed § 5.564), or to claims for benefits under § 3.816 by members of a certain class-action litigation.

Proposed § 5.552(b) states rules concerning the time limit for filing claims for accrued benefits and the absence of a time limit for filing claims for benefits awarded, but unpaid at death. Proposed § 5.552(b)(1), based on 38 U.S.C. 5121(c), states that "[a] claim for accrued benefits must be filed within one year after the date of the deceased beneficiary's death." Under both proposed § 5.552(b)(1) and 38 U.S.C. 5121(c), the one-year time limit only applies to "accrued benefits." Therefore, as provided in proposed § 5.552(b)(2), it does not apply to claims for "benefits awarded, but unpaid at death." However, as the previous discussion concerning the interplay between *Bonny v. Principi* and the Act shows, "benefits awarded, but unpaid at death" now exists as a separate category of benefits in only very limited circumstances. Therefore proposed § 5.552(b)(2) states the following:

*Benefits awarded, but unpaid at death.* There is no time limit for filing a claim for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending before VA on December 16, 2003. Paragraph (b)(1) of this section applies where "accrued benefits" includes "benefits awarded, but unpaid at death." See § 5.550(a)(2).

#### *5.553 Notice of Incomplete Claims*

The provisions of proposed § 5.553 are similar to those of current § 3.1000(c)(1) with modifications to reflect the structure of proposed part 5.

#### *5.554 Evidence of School Attendance in Claims by a Veteran's Children for Accrued Benefits or Benefits Awarded, but Unpaid at Death*

Proposed § 5.554 is based on current § 3.667(e). We propose to include information about the new category of "benefits awarded, but unpaid at death" within the scope of its provisions, to

correct an error in current § 3.667(e), and to clarify the rule concerning when verification of school attendance is required.

Current § 3.667(e) refers to "a veteran's child over 18 but under 23 years of age, who was pursuing a course of instruction at the time of the payee's death." This description of the beginning point of this age range may be misleading. The relevant statutory provision is found at 38 U.S.C. 101(4)(A)(iii), which includes within the definition of "child" a person who otherwise qualifies as a child and "who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution." The statutory period begins when the child attains the age of 18. The current regulation could be read as suggesting that the child must be age 19. Proposed § 5.554(a) clarifies this by referring to "a veteran's child who has attained the age of 18, but is under the age of 23."

Current § 3.667(e) provides that school attendance need not be confirmed when a claim for accrued benefits is filed by, or on behalf of, a child within a specified age range who was pursuing a course of instruction at the time of the payee's death and only payment of accrued benefits is involved. It also provides that "[w]hen the payee's death occurred during a school vacation period, the requirements [of the section] will be considered to have been met if the child was carried on the school rolls on the last day of the regular school term immediately preceding the date of the payee's death." Of course, it may be necessary to obtain information from the school in order for VA to know whether the child was carried on the school's rolls at the relevant time. Proposed § 5.554(b) and (c) have been drafted to allow for this contingency.

#### *5.555 What VA Benefits Are Potentially Payable as Accrued Benefits or Benefits Awarded, but Unpaid at Death?*

We propose in § 5.555 to state which benefits are potentially available as accrued benefits or benefits awarded, but unpaid at death, and which benefits are not.

The terms of 38 U.S.C. 5121(a) provide that benefits included as accrued benefits must be "periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary." This would clearly include VA pension, compensation, and DIC. Medal of Honor special pension under 38 U.S.C. 1562



and monetary benefits for veterans' children under 38 U.S.C. 1805, 1815, and 1821 are also "periodic monetary benefits \* \* \* under laws administered by the Secretary." Therefore, we propose to explicitly include all such benefits as qualifying benefits in § 5.555(b).

Section 156 of Pub. L. 97-377, 96 Stat. 1920-22, restored certain Social Security benefits that were reduced or terminated by the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357. Benefits payable under section 156 are commonly called REPS (Restored Entitlement Program for Survivors) benefits. We also propose to add REPS benefits to the list of those benefits that qualify as accrued benefits. REPS benefits are periodic monetary benefits because they are monthly payments, and, in the language of 38 U.S.C. 5121(a), they are paid "under laws administered by the Secretary." Pub. L. 97-377 provides that these payments are to be paid by "the head of the agency" and it defines the term "head of the agency" as "the head of such department or agency of the Government as the President shall designate to administer the provisions of this section." (Sec. 156(i)(1), Pub. L. 97-377, 96 Stat. 1922). Executive Order 12436, 48 FR 34929 (Aug. 2, 1983), designated "the Administrator of Veterans' Affairs" (now "the Secretary of Veterans Affairs") to administer the provisions of section 156 of Pub. L. 97-377. Therefore, we propose to include REPS benefits in the list of qualifying benefits in proposed § 5.555(b)(8).

Various benefits are excluded because they are not "periodic monetary benefits." The CAVC has determined that VA assistance in acquiring automobiles and adaptive equipment under 38 U.S.C. chapter 39 (*see Gillis v. West*, 11 Vet. App. 441 (1998)) and assistance in acquiring specially adapted housing under 38 U.S.C. Chapter 21 (*see Pappalardo v. Brown*, 6 Vet. App. 63 (1993)) are not "periodic monetary benefits." We propose to include these benefits as exclusions in § 5.555(c)(1) and (2).

Next, we propose to include insurance benefits as § 5.555(c)(3) in the list of benefits that do not qualify as potential accrued benefits or benefits awarded, but unpaid at death, because such benefits are specifically excluded by 38 U.S.C. 5121(a). The proposed exclusion of Naval pension in § 5.555(c)(4) is based on current § 3.803(d).

The list of exclusions we propose also includes a special allowance authorized by 38 U.S.C. 1312(a). This allowance is payable to the survivors of certain

veterans who die while in service or as the result of a service-connected disability incurred after September 15, 1940, and who were not fully and currently insured individuals under title II of the Social Security Act (42 U.S.C. 401 *et seq.*).

The special allowance payable under section 1312(a) is not available as accrued benefits because 38 U.S.C. 5121 applies to "periodic monetary benefits \* \* \* under laws administered by the Secretary [of Veterans Affairs]." Under 38 U.S.C. 1322(a), as amended by the Act, it is the Commissioner of Social Security, not the Secretary of Veterans Affairs, who primarily determines whether any survivor is entitled to the section 1312(a) special allowance and, if so, the amount of those benefits. Therefore, we propose to exclude this special allowance from the list of benefits available under 38 U.S.C. 5121 in proposed § 5.555(c)(5).

We propose to omit reference to an obsolete category of benefits referred to in current § 3.1000(a) as "servicemembers' indemnity." In particular, the Servicemen's Indemnity Act of 1951, Pub. L. 82-23, 65 Stat. 34, authorized VA to pay indemnity in the form of \$10,000 automatic life insurance coverage to the survivors of members of the Armed Forces who died in service. However, the Act authorizing such benefits was repealed in 1956 by section 502(9) of the Servicemen's and Veterans' Survivor Benefits Act, Pub. L. 84-881, 70 Stat. 886. Therefore, we propose to remove the obsolete reference to this benefit.

#### 5.556 *Period for Which Accrued Benefits Are Paid*

In keeping with the provisions of section 104 of the Act, proposed § 5.556(a) provides that, if the deceased beneficiary died prior to December 16, 2003, accrued benefits are limited to a period not to exceed 2 years. Note that through operation of the definitions in proposed § 5.550(a) and (b), this limitation would not apply to claims for benefits awarded, but unpaid at death, that were pending on December 16, 2003.

Historically, VA understood the 2-year limitation on payment of accrued benefits to mean a limitation to benefits accruing during the 2 years immediately preceding the veteran's death. In *Terry v. Principi*, No. 03-7107, 2004 U.S. App. LEXIS 9056, at \*13 (Fed. Cir. May 10, 2004), the United States Court of Appeals for the Federal Circuit held that 38 U.S.C. 5121(a), prior to its amendment by the Act, "only limits a survivor's recovery of accrued veteran's benefits to a maximum two-year period

of benefits accrued at any time during the veteran's life." We propose to state in § 5.556(a) that "[i]f benefits accrued for a period in excess of 2 years during the beneficiary's life, VA will pay benefits for the period of 24 consecutive months that produces the highest payment to the accrued benefits claimant."

Finally, proposed § 5.556(b) calls attention to a special exception to the 2-year limitation rule in § 3.816 concerning payments related to a certain class-action lawsuit.

#### 5.557 *Relationship Between Accrued Benefits Claim and Claims Filed by the Deceased Beneficiary*

This Notice of Proposed Rulemaking addresses another key court decision concerning the nature of accrued benefits claims and the interpretation of 38 U.S.C. 5121. In *Zevalkink v. Brown*, 102 F.3d 1236, 1241 (Fed. Cir. 1996), *cert. denied*, 521 U.S. 1103 (1997), the court stated the following concerning claims for accrued benefits:

A claim for accrued benefits under [38 U.S.C.] § 5121, as the Court of Veterans Appeals [now Court of Appeals for Veterans Claims] correctly held, is a separate claim from the veteran's claim for service connection because it is based on a separate statutory entitlement for which an application must be filed in order to receive benefits. See 38 U.S.C. § 5121(c) ("Applications for accrued benefits must be filed within one year after the date of death."). At the same time, however, an accrued benefits claim is derivative of the veteran's claim for service connection, *i.e.*, the claimant's entitlement is based on the veteran's entitlement.

The concepts explained in *Zevalkink* are incorporated in proposed § 5.557. Specifically, proposed § 5.557(a) provides that while an accrued benefits claim is a separate claim, the claimant's entitlement is based on the deceased beneficiary's entitlement.

A consequence of this principle is addressed in proposed § 5.557(b). The court set out the following explanation in *Zevalkink*, 102 F.3d at 1242:

If the existing decisions were adverse, then no benefits are payable. While living, the veteran was bound by those existing decisions and could not have had them reconsidered absent new and material evidence. Sections 5108 and 7104 of title 38 expressly preclude the [regional office] and [the Board of Veterans' Appeals] from considering a prior adjudicated claim unless new and material evidence is presented \* \* \*

Appellants have presented no compelling argument, nor pointed to any statutory language, showing why existing ratings and decisions should be reopened without such new and material evidence. Appellants argue, in effect, that the clause that states that

accrued benefits may be “based on evidence in the file at date of death” allows them to reopen, and have a new adjudication of, any existing decision or rating. As shown, however, this would be inconsistent with the other provisions of § 5121 and with the central purpose of the statute which is to pay accrued benefits based on “existing ratings and decisions.” Thus, we interpret the clause relied on by appellants as permitting the new adjudication of a prior claim only if there is new and material evidence in the file which has not previously been considered.

Proposed § 5.557(b) incorporates the court’s holding by providing that a claimant for accrued benefits is bound by any existing VA decisions to the same extent as the deceased beneficiary would have been bound.

#### *5.558 Special Rule for Certain Cases Involving Deaths Prior to December 16, 2003*

As previously discussed in this NPRM, VA regulations in effect at the time of the *Bonny* decision apply if the deceased beneficiary died prior to December 16, 2003, but VA received a claim for 38 U.S.C. 5121 benefits on or after December 16, 2003. This is because, effective on December 16, 2003, the basis for the *Bonny* court’s interpretation of 38 U.S.C. 5121(a) is no longer viable.

Therefore, we propose to provide in § 5.558 that if the deceased beneficiary died prior to December 16, 2003, but VA received a claim for benefits under 38 U.S.C. 5121 on or after that date, the claim will be adjudicated under the provisions of 38 CFR 3.1000, and sections cited therein, in effect on December 16, 2003. Because of the definition of “accrued benefits” in proposed § 5.550(a), § 3.1000 and the sections it cites would be applied uniformly to accrued benefits and to benefits awarded, but unpaid at death, in these cases.

#### *5.559 Accrued Benefits Reference Table*

The interrelationships of the proposed regulations concerning benefits under 38 U.S.C. 5121 are necessarily very complex, given the *Bonny* decision as modified by the provisions of the Act. Therefore, we propose to provide a table, with appropriate cross-references concerning differences in application of the one-year time limit to file a claim and the 2-year limitation on the benefit payable, as well as a list of potential benefit claimants.

#### *Death Compensation*

The second major portion of this NPRM concerns death compensation.

#### *5.560 Eligibility Criteria for Payment of Death Compensation*

The first regulation concerning death compensation is proposed § 5.560, a revision of current 38 CFR 3.4(a). In its current form, § 3.4(c)(2) informs readers that death compensation is available if the veteran died on or after May 1, 1957, and before January 1, 1972, if at the time of death a policy of United States Government Life Insurance (USGLI) or National Service Life Insurance (NSLI) was in effect under waiver of premiums pursuant to 38 U.S.C. 1924, “In-service waiver of premiums,” unless the waiver was granted under the first provision of section 622(a) of the National Service Life Insurance Act of 1940 (now 38 U.S.C. 1924), and the veteran died before or within 120 days of return to military jurisdiction. We propose to remove this provision because it is obsolete.

The DIC program was established in 1956 by Pub. L. 84–881, 70 Stat. 862, which provided that DIC, rather than death compensation, would be payable for service-related deaths after December 31, 1956. However, section 501(a)(3)(B) of Pub. L. 84–881, 70 Stat. 880, provided that DIC could not be paid in cases when an NSLI or USGLI policy was in effect under a waiver of premiums based on section 622 of the National Service Life Insurance Act of 1940. Section 501(a)(3)(B) stated that death compensation could be paid in those cases, even though the death occurred after December 31, 1956. In 1958, this provision was codified, as amended, at 38 U.S.C. 417(a). Also in 1958, Congress enacted 38 U.S.C. 321 and 341 (now 38 U.S.C. 1121 and 1141, respectively) to provide that death compensation could be paid when a veteran died before January 1, 1957 “(or after April 30, 1957, under the circumstances described in section 417(a) of this title).” Secs. 321, 341, Pub. L. 85–857, 72 Stat. 1122–23.

In 1971, Congress removed 38 U.S.C. 417(a) and amended sections 321 and 341 by removing the provision authorizing death compensation for deaths after April 30, 1957. *See* secs. 5, 6, Pub. L. 92–197, 85 Stat. 662. Congress also provided that any person who was receiving or entitled to receive death compensation on December 31, 1971, would continue to receive that compensation unless they elected to receive DIC. Sec. 8, Pub. L. 92–197, 85 Stat. 662.

As the foregoing indicates, there is currently no authority to award death compensation for deaths on or after January 1, 1957. After that date, VA compensation for such deaths is

governed exclusively by the DIC provisions in chapter 13 of title 38, United States Code. Therefore, we propose to remove current § 3.4(c)(2).

Proposed § 5.560(d) provides that VA will apply the same rules for determining the dependency of parents for death compensation purposes that it uses to determine the dependency of parents for the purpose of awarding additional compensation to a veteran with a dependent parent. The rules are the same and, particularly in view of the fact that there are now relatively few death compensation claimants, we believe this is preferable to repeating the complex rules for determining dependency in proposed subpart G of part 5.

#### *5.561 Time of Marriage Requirement for Death Compensation Claims*

Proposed § 5.561, based on relevant portions of current § 3.54, provides rules related to the time of marriage requirement for surviving spouses claiming entitlement to death compensation. As explained in proposed § 5.561(a), a marriage between the veteran and the veteran’s surviving spouse that occurred before or during the veteran’s military service meets time of marriage requirements for death compensation purposes.

A surviving spouse who married the veteran after service may meet the time of marriage requirement for death compensation eligibility under 38 U.S.C. 1102 in four ways, as explained in proposed § 5.561(b) and (c), which are based on current § 3.54(b). The first way is stated in proposed § 5.561(b), which preserves the provisions of the introductory paragraph of current § 3.54(b) and 38 U.S.C. 1102(b) that permit a surviving spouse to qualify for death compensation if the surviving spouse would have qualified under the law in effect on December 31, 1957.

Proposed § 5.561(c)(1) addresses the second way a surviving spouse may meet the time of marriage requirements for death compensation. As stated in 38 U.S.C. 1102(a)(1), this is for the marriage to have occurred “before the expiration of fifteen years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated.” We propose to include a provision, based on 38 U.S.C. 103(b) and current § 3.54(e), that states that “[w]here the surviving spouse has been married legally to the veteran more than once, the date of the original marriage will be used in determining whether this requirement has been met.”

We have not included the introductory clause in the first sentence



of current § 3.54(e) in proposed § 5.561(c)(1). That clause limits the scope of § 3.54(e) to “periods commencing on or after January 1, 1958.” January 1, 1958, is the effective date of the Veterans’ Benefits Act of 1957 (1957 Act), Pub. L. 85–56, 71 Stat. 83. The 1957 Act primarily served to consolidate laws concerning veterans’ benefits into one statute. The text of one of the 1957 Act’s provisions is similar to current 38 U.S.C. 103(b). *See* sec. 103, Pub. L. 85–56, 71 Stat. 90. However, the law in effect prior to passage of the 1957 Act also permitted using the original date of marriage to determine if date of marriage requirements had been met in death compensation cases where the surviving spouse and the veteran had been married more than once. *See* sec. 3, Pub. L. 78–483, 58 Stat. 804.

We also propose to clarify in § 5.561(c)(1) that “period of service” in this context means a period of active military service from which the veteran was discharged under other than dishonorable conditions. Death compensation is payable to the surviving spouse of a “veteran” and, except for persons who die in service, a veteran is a person who was discharged or released from service under conditions other than dishonorable. 38 U.S.C. 101(2).

The third way in which a surviving spouse who married the veteran after service may meet the time of marriage requirements is to have been married to the veteran for a year or more. The statutory provision that sets the one-year marriage requirement relating to death compensation claims, 38 U.S.C. 1102(a)(2), is silent as to whether the one year of marriage must have been continuous. We propose to permit adding periods of marriage together to determine whether the one-year requirement has been met in cases where the surviving spouse and the veteran were married more than once. The one-year marriage requirement is designed to prevent abuse by sham “death bed” marriages to obtain benefits. We believe that there is much less risk of such abuse where the veteran and the surviving spouse have had an ongoing close relationship demonstrated by previous marriage.

Finally, a surviving spouse who married the veteran after service may meet the time of marriage requirement for death compensation if a child was born of the marriage, or born before the marriage. Proposed § 5.561(c)(3) includes this rule and refers the user to § 3.54(d) for definitions of “child born of the marriage” and child “born “ before the marriage.”

#### *5.562 Eligibility Criteria for Special Monthly Death Compensation*

Proposed § 5.562, based on current § 3.351(a)(6), (b), and (c), provides for payment of increased death compensation based on the need for regular aid and attendance. We propose to correct an omission from current § 3.351(a)(6), which provides for increased death compensation only for a surviving spouse who is in need of aid and attendance. The underlying statute, 38 U.S.C. 1122(b), provides for special monthly death compensation for dependent parents in need of aid and attendance, as well as for surviving spouses. Proposed § 5.562(a) clarifies that both classes of claimants are potentially eligible. While the correction of the omission in the regulation is new, this does not represent a change in VA practice, inasmuch as VA complies with the authorizing statute.

#### *Special Provisions*

The next section of this NPRM contains proposed regulations that set out special provisions concerning the disposition of the proceeds of certain VA benefits upon the death of the person receiving those benefits.

#### *5.563 Special Rules When a Beneficiary Dies While Receiving Apportioned Benefits*

The first proposed regulation in this group, § 5.563, is based on current § 3.1000(b). Proposed § 5.563(a) would implement the broad authority given to VA under 38 U.S.C. 5121(a)(1): “Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits [shall be paid] to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.”

The current regulation provides that when a person receiving an apportioned share of a veteran’s benefits dies, all or any part of an unpaid apportionment is payable to the veteran or to the veteran’s surviving dependents. However, it does not specify how VA makes determinations concerning surviving dependents. Proposed § 5.563(a), following long-standing VA practice, provides for payment of the unpaid apportionment to the veteran, if the veteran survives, or to the surviving dependents of a deceased veteran. We propose to use the same order of priority specified in 38 U.S.C. 5121(a)(2), which is applicable to accrued benefits and benefits awarded, but unpaid at death, to determine which dependents of a deceased veteran are entitled to these

funds. This is accomplished through a cross-reference to proposed § 5.551(b).

#### *5.564 Special Rules When VA Benefit Checks Have Not Been Negotiated Prior to the Beneficiary’s Death*

The second proposed regulation in this group of special provisions is § 5.564, which is based on current § 3.1003. This regulation provides rules concerning the disposition of VA benefit checks that were not negotiated at the time of the death of the beneficiary. We propose to use the term “beneficiary,” rather than “payee” as currently used in § 3.1003, to clarify that the provisions of this proposed section would not apply to payees who die and who are not VA beneficiaries themselves, such as fiduciaries who receive VA benefit checks on behalf of a minor or incompetent VA beneficiary. In VAOPGCPREC 8–96, VA’s General Counsel noted that the statutory scheme and the legislative history of 38 U.S.C. 5122, the statutory authority for this regulation, suggest that the statute applies only when the individual actually entitled to VA benefits has died before a VA check in payment of such benefits has been negotiated.

Proposed § 5.564(a)(1) states the general rule that non-negotiated VA benefit checks must be returned to the office that issued the checks upon the death of the beneficiary. Proposed § 5.564(a)(2) provides an exception to the general rule, which is currently found in 38 CFR 3.20(c)(2), that under certain circumstances a surviving spouse may negotiate a veteran’s check for compensation or pension for the month in which the veteran died.

#### *5.565 Special Rules for Payment of VA Benefits on Deposit in a Special Deposit Account When a Payee Living in a Foreign Country Dies*

The next regulation in this proposed rulemaking is comprised of rules for disposition of funds deposited in an account called “Secretary of the Treasury, Proceeds of Withheld Foreign Checks” (“special deposit account”) upon the death of the payee. Such accounts are necessary because of provisions in 31 U.S.C. 3329, “Withholding checks to be sent to foreign countries,” and 31 U.S.C. 3330, “Payment of Department of Veterans Affairs checks for the benefit of individuals in foreign countries.”

Under 31 U.S.C. 3329, the Secretary of the Treasury must prohibit Federal payments from being sent to a foreign country when the Secretary of the Treasury decides that there is no reasonable assurance the payee will receive it or, if they receive it, will be

able to negotiate it for its full value. Subject to certain conditions, the funds are deposited in the special deposit account.

A companion statute, 31 U.S.C. 3330, provides special rules for implementing 31 U.S.C. 3329 when the Federal payment in question involves VA benefit checks. Among other things, section 3330 limits the amount to be deposited in the special deposit account to \$1,000 and provides rules for disposition of the money in that account when the payee dies.

The rules for disposition of funds in the special deposit account upon the death of the payee are the subject of current § 3.1008. The current section, however, refers to obsolete legal authorities. In addition, the current section omits practical details about how the funds in the special deposit account are distributed, information about statutory time limits for filing a claim for the funds and filing supporting evidence, and other information that would be helpful to users of the regulation. Proposed § 5.565 addresses all of these concerns.

In § 5.565(b)(3) we propose to provide that “[i]f the deceased payee was the recipient of an apportioned share of the veteran’s pension or compensation, [the funds in the special deposit account are payable] to the veteran to the extent the special deposit account consists of such apportionment payments.” This is based upon our interpretation of language in 31 U.S.C. 3330(c)(3):

(c) If the payee of a check for pension, compensation, or emergency officers’ retirement pay under laws administered by the Secretary of Veterans Affairs dies while the amount of the check is in the special deposit account, the amount is payable (subject to section 3329 of this title and this section) as follows:

\* \* \* \* \*

(3) after the death of an apportionee of a part of the veteran’s pension, compensation, or emergency officers’ retirement pay but before all of the apportioned amount is paid to the veteran, the apportioned amount not paid.

The original statutory language in section 3(c) of Pub. L. 76–828, 54 Stat. 1087, was clearer. It provided that:

\* \* \* upon the death, prior to disbursement of all or any part of the apportioned amount, of an apportionee of a part of the veteran’s pension, compensation, or emergency officers’ retirement pay, such apportioned amount not disbursed shall be payable to the veteran.

This language was codified as part of 31 U.S.C. 125 and carried forward for many years. *See, e.g.*, 31 U.S.C. 125 (1976).

Pub. L. 97–258 completely recodified title 31, United States Code. Among other things, it substituted the current language of 31 U.S.C. 3330(c) for the pertinent provisions of former 31 U.S.C. 125. Pub. L. 97–258, 96 Stat. 954. The United States Code Congressional and Administrative News includes the House Report submitted with this legislation. The commentary concerning section 3330 does not explain the changes introduced in section 3330(c)(3). H.R. Rep. No. 97–651, at 107 (1982), *reprinted* in 1982 U.S.C.C.A.N. 1895, 2001. Nevertheless, the statement of the purpose of the legislation indicates that “[t]he purpose of the bill is to restate in comprehensive form, *without substantive change*, certain general and permanent laws related to money and finance and to enact those laws as title 31, United States Code.” H. Rep. No. 97–651, at 1, *reprinted* in 1982 U.S.C.C.A.N. at 1895 (emphasis added). Particularly in view of this legislative history, we believe that proposed § 5.565(c)(3) accurately interprets 31 U.S.C. 3330(c)(3) and is clearer.

We also propose to omit the reference to “servicemembers indemnity” found in current § 3.1008. As explained in the discussion of proposed § 5.555, this is an obsolete VA benefit program.

Paragraph (c) of proposed § 5.565 contains rules regarding filing requirements for claims under this section and follows language in 31 U.S.C. 3330(d). Under 31 U.S.C. 3330(d)(1)(A), claims for VA benefits in the special deposit account when the payee dies must be “filed with the Secretary of Veterans Affairs by the end of the first year after the date of the death of the individual entitled to payment.” As with the language discussed earlier concerning the disposition of accrued benefit payments in the special deposit account, the claim-filing deadline was clearer in Pub. L. 76–828 and its original codification. “[N]o disbursement shall be made unless claim therefor be filed in the Veterans’ Administration within one year from the date of the death of the person entitled.” 31 U.S.C. 125 (1976). Again, the legislative history shows no intent to make any substantive change in the 1982 recodification. Therefore, we propose to state that “[a] claim for the funds in the special deposit account must be received by VA within one year after the date of the payee’s death.”

Proposed § 5.565(d) provides rules relating to two restrictions on claims governed by proposed § 5.565. The first, a restriction on payments to amounts due at the time of death under ratings or decisions existing at the time of the death in paragraph (d)(1), is based on 31

U.S.C. 3330(d)(2). The second, a restriction concerning the loyalty of the claimant and the deceased beneficiary to the United States in paragraph (d)(2), is based on the last sentence of current § 3.1008. This restriction is consistent with provisions of 38 U.S.C. 6104, “Forfeiture for treason.”

#### *5.566 Special Rules for Payment of Gratuitous VA Benefits Deposited in a Personal Funds of Patients Account When an Incompetent Veteran Dies*

The final regulation in this section governs disposition of certain VA benefits upon the death of a veteran who was unable to conduct his or her own financial affairs. One way to safeguard VA benefits awarded to a mentally incompetent institutionalized veteran is to order that the funds be held in a personal funds of patients (PFOP) trust fund account and disbursed for the benefit of the veteran or the veteran’s dependents. *See* 38 U.S.C. 5502(d) and 5504. Proposed § 5.566, based on current § 3.1009, sets out how benefits described in 38 U.S.C. 5502(d) as “gratuitous” VA benefits in the PFOP account are distributed when the veteran dies.

Proposed § 5.566(b) includes a cross-reference to a proposed new definition of the statutory term “gratuitous VA benefits” that will appear in another NPRM as part of the Project. Proposed § 5.566(b) also clarifies that the section only applies to funds on deposit in the PFOP account at the date of the veteran’s death.

Proposed § 5.566(c)(1) provides that the section does not apply to funds that were deposited in the PFOP account by the veteran or others (as opposed to benefits deposited in the PFOP account by VA). Proposed § 5.566(c)(2) states that this section does not apply to earned interest or similar increases in value following the original deposit by VA. As to the latter exclusion, we adopt the rationale stated in VAOPGCPREC 6–91:

16. The third question in subparagraph c. of your memorandum is as to the applicability of the provisions of Section 3202(d) to the interest earned on U.S. Savings Bonds purchased by a Manager on behalf of a veteran from gratuitous VA benefits in a PFOP account where the bonds are redeemed during the veteran’s lifetime. It must be accepted as a fact that such interest is not a gratuitous benefit under the laws administered by the VA within the meaning of the language in Section 3202(d), as defined in paragraph D.3.a. of Interim Issue (CONTR–169), quoted *supra*. The portions of H.R. Report No. 303 quoted in paragraphs 9 and 12 of this memorandum show that the Committee used the term “derived” from veterans’ benefits to describe the funds to

which Section 3202(d) relates and, as stated in paragraph 13 hereof, the Congress appears to have used that phrase with its usual or ordinary meaning. It would, therefore, appear to be a proper construction that the term was intended to mean the source or origin of the particular thing under consideration (gratuitous VA benefits here), and hence, not an increased value of the gratuitous benefits but only their value at the original source. Accordingly, it is the opinion of this office that such interest should not be considered to be subject to disposition in accordance with the provisions of Section 3202(d) of Title 38, U.S.C., as amended.

Proposed § 5.566(d) governs entitlement to the funds in the PFOP account upon the death of the veteran. Consistent with the authorizing statute, 38 U.S.C. 5502(d), we propose to clarify that the recipient must be living at the time of settlement and that in this context “settlement” means the time when VA pays out the PFOP account.

Current § 3.1009(a) lists the persons eligible for funds in the PFOP account upon the veteran’s death. It gives the highest priority to the veteran’s spouse and incorporates the definition of spouse in current § 3.1000(d)(1) by reference. For the reasons noted in the discussion of proposed § 5.550(h), we have proposed replacing the § 3.1000(d)(1) definition of “spouse” with a definition of “surviving spouse.” This is clearly appropriate because the authorizing statute specifies surviving spouse. Therefore, we propose providing that the potential recipient with the highest priority is “[t]he veteran’s surviving spouse, as defined in § 5.550(h).”

#### *Effective Dates*

##### *5.567 Effective Dates for DIC or Death Compensation Awards*

Proposed § 5.567 is based on portions of current §§ 3.400(c) and 3.402(a).

Current § 3.400(c)(4)(ii), the basis for proposed § 5.567(d), states that the effective date for the award of DIC to a child is the “[f]irst day of the month in which entitlement arose if claim is received within 1 year after the date of entitlement; otherwise, date of receipt of claim.” Because a number of VA effective date regulations use various language concerning the “date entitlement arose,” VA will be proposing a new centralized definition of “date entitlement arose” as part of a separate rulemaking document published for public comment at another time. Therefore, where applicable, we have cross-referenced the proposed new centralized definition.

With respect to § 3.400(c)(4), the omission of a proposed rule based on § 3.400(c)(4)(iii) is intentional. Current

§ 3.400(c)(4)(iii) concerns the effective date of awards of DIC to persons who elect DIC in lieu of death compensation in certain cases involving veterans who died from May 1, 1957, to January 1, 1972. *See also* current §§ 3.5(b)(3) and 3.702(a). For the reasons discussed earlier, see the supplementary information concerning proposed § 5.560, the provisions that once permitted the award of death compensation for death occurring on or after May 1, 1957, are now obsolete. Therefore, § 3.400(c)(4)(iii) is also obsolete. Persons who are still receiving death compensation under the old law because of the death of a veteran from May 1, 1957, to January 1, 1972, and who now elect DIC in lieu of death compensation would be covered by the general DIC election effective date in proposed § 5.567(c).

##### *5.568 Effective Date for Discontinuance of DIC or Death Compensation Payments to a Person No Longer Recognized as the Veteran’s Surviving Spouse.*

Current § 3.657 addresses two different effective date and payment adjustment scenarios that may arise when an individual is recognized as the surviving spouse and is awarded DIC or death compensation. The first scenario is addressed in § 5.568 and the second in § 5.569.

The first scenario occurs when VA is paying DIC or death compensation to one person who claims to be the surviving spouse of a veteran, but another person later claims DIC or death compensation and successfully establishes that he or she is actually the veteran’s lawful surviving spouse. Current § 3.657(a) governs the effective date for the discontinuance of the award to the person previously recognized as the veteran’s surviving spouse.

Proposed § 5.568(b) is taken from current § 3.657(a) with two exceptions. First, 38 U.S.C. 5112(b)(6) provides that the effective date for a reduction or discontinuance of compensation, DIC, or pension “by reason of change in law or administrative issue” or a “change in interpretation of a law or administrative issue” will be “the last day of the month following sixty days from the date of notice to the payee (at the payee’s last address of record) of the reduction or discontinuance.” *See also* current § 3.114(b). We propose to add this exception as § 5.568(b)(3). Second, current § 3.657(a)(1) and (2) refer to payments to the legal surviving spouse being effective either prior to or from the date of “filing claim.” The operative effective date is not the date of filing, but the date VA receives the claim. *See*

38 U.S.C. 5110(a). Therefore, we propose to clarify the relevant language so that it refers to date of receipt, rather than date of “filing.”

##### *5.569 Effective Date for Award, or Termination of Award, of DIC or Death Compensation to a Surviving Spouse Where DIC or Death Compensation Payments to Children Are Involved*

Proposed § 5.569 addresses the second effective date and payment adjustment scenario in current § 3.657. It concerns DIC or death compensation effective dates and payment adjustments when a veteran is survived by a spouse and a child or children. (In the remainder of this discussion concerning proposed § 5.569, “children” means a child or children.)

This scenario, in turn, involves two possible situations: (1) The surviving spouse is awarded DIC or death compensation, and a separate award for the surviving children therefore terminates; or (2) the surviving spouse’s eligibility for DIC or death compensation terminates (by remarriage, for example), and the veteran’s surviving children are eligible to receive DIC or death compensation because of termination of the surviving spouse’s entitlement, but the surviving spouse continues to receive DIC or death compensation after termination of his or her entitlement.

The current rules for situation (2) are not as comprehensive as those for situation (1). For situation (1), current § 3.657(b)(1) provides effective date and payment adjustment rules that apply where the rate for the children is lower than the rate for the surviving spouse and where the rate for the children is the same as or higher than the rate for the surviving spouse. Current § 3.657(b)(2) provides effective date rules that apply to situation (2) where the children’s rate is lower than the rate for the surviving spouse and where the children’s rate is higher than the rate for the surviving spouse. However, there is no guidance about what to do if the rates are the same. We propose, in § 5.569(c)(3), to add rules that would apply in situation (2) when the children’s rate is the same as the rate for the surviving spouse.

We believe that this proposed change would produce a correct and equitable result. Current § 3.657 essentially looks at the overall family unit for setting rules for these payment adjustments and effective dates. Section 3.657(b)(2) provides that when the rate for the children is lower than the rate for the surviving spouse, payments to the surviving spouse are retroactively reduced to the children’s rate effective

from the date the surviving spouse's entitlement terminated. The award for the children is effective from the day following the date of last payment to the surviving spouse. If the rate for the children is higher than the rate for the surviving spouse, the award to the surviving spouse is terminated as of the date of the last payment to the spouse. The award for the children consists of an amount equal to the difference between the children's rate and the surviving spouse's rate from the date the surviving spouse's entitlement terminated until the date of last payment to the surviving spouse, and then the full rate thereafter. These rules result in benefits flowing to the family unit as a whole in the amounts properly payable to the various family members.

When the rates for the children and surviving spouse are the same, we propose to terminate the award to the surviving spouse on the date of last payment and to make the award to the children effective the following day. This would also achieve the same result. That is, benefits would flow to the overall family unit in the amounts properly payable to the family members.

#### *5.570 Effective Date for Reduction in DIC—Surviving Spouses*

Proposed § 5.570 is based on the introductory paragraph and paragraphs (a) and (b) of current § 3.502. We propose to omit the references to § 3.500(n)(3) that appear in current § 3.502(a)(1) and (2) because § 3.500(n)(3) does not deal with the situations described in proposed § 5.570.

#### *5.571 Effective Dates for an Award or Increased Rate Based on Amended Income Information—Parents' DIC*

Proposed § 5.571, based on current § 3.660(b), provides information regarding effective dates for increases or awards of parents' DIC following the submission of amended income information.

Current § 3.660(b)(1) provides that if payments were not made, or were made at a lower rate, on the basis of anticipated income, parents' DIC may be awarded or increased "in accordance with the facts found but not earlier than the beginning of the appropriate 12-month annualization period if satisfactory evidence is received within the same or the next calendar year."

It has been VA's historical procedure to make income determinations for entitlement to parents' DIC on a calendar-year basis. Although the "12-month annualization period," would include a calendar year, we believe that this language could be confusing to

readers and adjudicators. Therefore, we propose to use the term "calendar year" instead of "12-month annualization period."

Another change has to do with the use of the term "facts found" in current § 3.660(b)(1). VA interprets "facts found" and another phrase used in several effective date rules, "date entitlement arose," to have the same basic meaning. As explained previously, we propose to use only one of these terms, "date entitlement arose," to improve consistency. Therefore, where applicable, we propose to replace the phrase "in accordance with the facts found" with a cross-reference to the proposed new standardized definition of "date entitlement arose."

Proposed § 5.571(c) refers to a regulation to be published in another NPRM. That proposed regulation will provide rules concerning the submission of amended income information by parents' DIC beneficiaries. Those rules will include the time limits for submitting amended income information currently found in § 3.660(b).

#### *5.572 Effective Dates for Reduction or Discontinuance Based on Increased Income—Parents' DIC*

The last regulation in this NPRM, based in part on current § 3.660(a), is § 5.572, which provides information regarding effective dates for parents' DIC reductions or discontinuances based on increased income.

Proposed § 5.572(c) addresses a gap in current § 3.660, which does not specify the effective date rule VA uses when it is unable to determine the month in which income increased. It has been VA's practice in such situations to reduce or discontinue the parent's award effective the beginning of the calendar year in which the income increased. We believe the regulation will be more comprehensive by including this information. We also believe that the stated rule is equitable because proposed § 5.572(c) provides that the effective date of the reduction or discontinuance will be adjusted accordingly if VA later receives information regarding the month income increased.

#### **Removal of 38 CFR 3.400(h)(4) and 3.503(a)(9).**

We next propose to remove current § 3.400(h)(4) as part of this NPRM. That section concerns the effective date for an award of VA death benefits based upon a difference of opinion with a prior denial of those benefits. Paragraph (h)(4) provides this rule:

Where the initial determination for the purpose of death benefits is favorable, the commencing date will be determined without regard to the fact that the action may reverse, on a difference of opinion, an unfavorable decision for disability purposes by an adjudicative agency other than the Board of Veterans' Appeals, which was in effect at the date of the veteran's death.

We understand this provision to mean that VA will apply the normal effective date rule applicable to death benefit claims, rather than rules applicable to awards based on a difference of opinion, when it grants a dependant's claim for death benefits even though a claim from the veteran, based on similar facts, may have been denied during his or her lifetime. For example, if a veteran were denied service connection for a particular type of cancer, but a VA regional office later granted service connection for the cause of the veteran's death from that same type of cancer, VA would establish the effective date without regard to the fact that the veteran's claim had been denied in the past.

We propose to omit this provision from new part 5. Although it does not lead to an incorrect result, it is unnecessary. Further, it implies a relationship, which does not exist, between two entirely different types of claims: a veteran's disability claim and a survivor's claim for death benefits. ("Death benefits" in this context include death compensation, DIC, and death pension. *See Zevalkink*, 102 F.3d at 1242.)

Certainly, as in the illustration about a veteran whose claim for service connection for cancer was denied while the survivor's claim for service connection for the cause of the veteran's death from the same illness was granted, a veteran's disability claim and a survivor's claim for death benefits can involve similar factual and legal issues. However, it is now quite clear that a veteran's disability claim does not survive his or her death. *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998). A claim for death benefits by a survivor is considered a new, independent claim.

When a veteran dies from a service-connected disability, the veteran's surviving spouse is eligible for DIC. *See* 38 U.S.C. § 1310; 38 CFR § 3.5(a) (1995). Such a claim for DIC is generally treated as an original claim by the survivor, regardless of the status of adjudications concerning service-connected-disability claims brought by the veteran before his or her death.

*Green v. Brown*, 10 Vet. App. 111, 114 (1997).

Because the claims are separate, a denial of a veteran's disability claim followed by an award of a surviving dependent's claim for death benefits is not an award based on a difference of opinion, even though there may be some overlapping factual and legal issues. Therefore, because current § 3.400(h)(4) adds nothing substantive and could be a source of confusion, we propose its removal.

We also propose to remove current § 3.503(a)(9). The current regulation states, in pertinent part:

(a) The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a child, or to or for a veteran or surviving spouse on behalf of such child, will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

\* \* \* \* \*

(9) *Surviving spouse becomes entitled.* Date of last payment. See § 3.657.

Because the subject matter of this rule would be adequately addressed in proposed § 5.569, "Effective date for award, or termination of award, of DIC or death compensation to a surviving spouse where DIC or death compensation payments to children are involved," we believe § 3.503(a)(9) would become unnecessary and we propose to remove it.

#### **Endnote Regarding Removals (Deletions) From Part 3 of 38 CFR**

For the reasons shown in the preceding supplementary information, the amendments proposed in this document would, if adopted, result in removal of current §§ 3.1000 and 3.1002 through 3.1009, and portions of §§ 3.4, 3.54, 3.503, 3.351, 3.400, 3.657, 3.660, 3.667, 3.704, and 3.803. This would be the case because those part 3 sections, or portions of sections, would be replaced by new part 5 sections or they would be removed entirely. Readers are invited to comment both on these part 3 removals and on the proposed new part 5 rules at this time.

NPRMs frequently include formal "amendatory language" listing the sections, or portions of sections, that would be removed if the proposed amendments are adopted. However, we have not included such "amendatory language" in this NPRM because of the nature of this Project. Because of the very large scope of the Project, we are publishing proposed amendments in several NPRMs. Then, after public comments in response to all of the

NPRMs making up the Project have been reviewed and considered, VA will propose to remove all of part 3, concurrent with the implementation of part 5.

#### **Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Order 12866**

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of, \$100 million or more in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

#### **Catalog of Federal Domestic Assistance Numbers**

The Catalog of Federal Domestic Assistance program numbers for this proposal are 64.100–102, 64.104–110, 64.115, and 64.127.

#### **List of Subjects in 38 CFR Part 5**

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

Approved: June 18, 2004.

**Anthony J. Principi,**  
*Secretary of Veterans Affairs.*

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5, as proposed to be added at 69 FR 4832, January 30, 2004, by adding subpart G to read as follows:

### **PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS**

#### **Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary**

Sec.

5.500–5.549 [Reserved]

#### **Accrued Benefits**

- 5.550 Definitions.
- 5.551 Persons entitled to accrued benefits or benefits awarded, but unpaid at death.
- 5.552 Claims for accrued benefits or benefits awarded, but unpaid at death.
- 5.553 Notice of incomplete claims.
- 5.554 Evidence of school attendance in claims by a veteran's children for accrued benefits or benefits awarded, but unpaid at death.
- 5.555 What VA benefits are potentially payable as accrued benefits or benefits awarded, but unpaid at death?
- 5.556 Period for which accrued benefits are paid.
- 5.557 Relationship between accrued benefits claim and claims filed by the deceased beneficiary.
- 5.558 Special rule for certain cases involving deaths prior to December 16, 2003.
- 5.559 Accrued benefits reference table.

#### **Death Compensation**

- 5.560 Eligibility criteria for payment of death compensation.
- 5.561 Time of marriage requirements for death compensation claims.
- 5.562 Eligibility criteria for special monthly death compensation.

#### **Special Provisions**

- 5.563 Special rules when a beneficiary dies while receiving apportioned benefits.
- 5.564 Special rules when VA benefit checks have not been negotiated prior to the beneficiary's death.
- 5.565 Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.
- 5.566 Special rules for payment of gratuitous VA benefits deposited in a personal funds of patients account when an incompetent veteran dies.

#### **Effective Dates**

- 5.567 Effective dates for DIC or death compensation awards.
- 5.568 Effective date for discontinuance of DIC or death compensation payments to a person no longer recognized as the veteran's surviving spouse.
- 5.569 Effective date for award, or termination of award, of DIC or death compensation to a surviving spouse where DIC or death compensation payments to children are involved.
- 5.570 Effective date for reduction in DIC—surviving spouses.
- 5.571 Effective date for an award or increased rate based on amended income information—parents' DIC.
- 5.572 Effective dates for reduction or discontinuance based on increased income—parents' DIC.

5.573–5.579 [Reserved]

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

**Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary**

**§§ 5.500–5.549 [Reserved]**

**Accrued Benefits**

**§ 5.550 Definitions.**

The following definitions apply to §§ 5.551 through 5.559:

(a) *Accrued benefits.* (1) “Accrued benefits” means unpaid periodic monetary VA benefits to which an individual was entitled, based on the evidence in the file on the date of his or her death, from a claim for VA benefits pending on the date of death.

(2) “Accrued benefits” also includes benefits awarded, but unpaid at death:

(i) If the deceased beneficiary died on or after December 16, 2003;

(ii) If the deceased beneficiary died prior to December 16, 2003, but VA received the claim for benefits under 38 U.S.C. 5121 on or after December 16, 2003; and

(iii) For purposes of § 5.558, “Special rule for certain cases involving deaths prior to December 16, 2003.”

(3) “Accrued benefits” does not include benefits awarded, but unpaid at death, when the deceased beneficiary died prior to December 16, 2003, and a claim for benefits under 38 U.S.C. 5121 was pending before VA on December 16, 2003. (For purposes of paragraph (a)(3) of this section, VA will consider a claim to be pending if there was no final decision on that claim as of December 16, 2003. *See* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining a final decision)).

(b) *Benefits awarded, but unpaid at death,* means unpaid periodic monetary VA benefits awarded to an individual by a VA rating or decision before the individual died.

(c) *Child* means a child as defined in § 3.57 of this chapter. If qualification as a child for purposes of accrued benefits or benefits awarded, but unpaid at death, is based on pursuit of a course of instruction at an approved educational institution, the child must have been within the age range specified by § 3.57(a)(1)(iii) of this chapter on the date of the deceased beneficiary's death.

(d) *Claim for VA benefits pending on the date of death* means a claim filed with VA which had not been finally adjudicated by VA on or before the date of death. Such a claim may include a deceased beneficiary's claim to reopen a

finally disallowed claim based upon new and material evidence or a deceased beneficiary's claim of clear and unmistakable error in a prior rating or decision. Any new and material evidence must have been in VA's possession on or before the date of the beneficiary's death.

(e) *Deceased beneficiary* means the deceased person whose VA benefits are being claimed as accrued benefits or benefits awarded, but unpaid at death.

(f) *Dependent parent* means a parent as defined in § 3.59 of this chapter who was dependent within the meaning of § 3.250 of this chapter at the date of the veteran's death.

(g) *Evidence in the file on the date of death* means evidence in VA's possession on or before the date of the deceased beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death.

(h) *Surviving spouse.* (1) Except as provided in paragraph (h)(2) of this section, “surviving spouse” means a surviving spouse as defined in § 3.50(b) of this chapter.

(2) If the marriage between the veteran and the surviving spouse meets the definition of marriage in § 3.1(j) of this chapter, the following requirements do not apply:

(i) The marriage requirements for death pension in § 3.54(a) of this chapter, for dependency and indemnity compensation in § 3.54(c) of this chapter, and for death compensation in § 5.561; and

(ii) The continuous cohabitation requirement in § 3.50(b)(1) of this chapter.

(Authority: 38 U.S.C. 501(a), 5121(a); Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

**§ 5.551 Persons entitled to accrued benefits or benefits awarded, but unpaid at death.**

(a) *Purpose.* This section provides the general rules for determining who is entitled to accrued benefits or benefits awarded, but unpaid at death. These general rules are subject to § 3.1001 of this chapter (concerning payment of certain amounts withheld from VA benefits awarded to hospitalized veterans); § 5.558, “Special rule for certain cases involving deaths prior to December 16, 2003”; § 5.563, “Special rules when a beneficiary dies while receiving apportioned benefits”; and § 5.565, “Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.” *See also* § 3.816 of this chapter, “Awards under the Nehmer Court Orders for disability or death caused by a condition

presumptively associated with herbicide exposure.”

(b) *Deceased beneficiary was the veteran.* If the deceased beneficiary was the veteran, benefits are payable to a living person, or persons, in the following order:

(1) The veteran's surviving spouse.

(2) The veteran's surviving children (in equal shares).

(3) The veteran's surviving dependent parents (in equal shares) or the surviving dependent parent if only one is living.

(c) *Deceased beneficiary was the veteran's spouse—*(1) *Surviving spouse of a deceased veteran.* If the deceased beneficiary was the surviving spouse or remarried surviving spouse of a deceased veteran, then VA will pay benefits to the veteran's children in equal shares. If there are no such children, then VA will pay accrued benefits as stated in paragraph (e) of this section.

(2) *Spouse of a living veteran.* If the deceased beneficiary was the spouse of a living veteran, then VA will pay accrued benefits as stated in paragraph (e) of this section.

(d) *Deceased beneficiary was the veteran's child—*(1) *General rule.* If the deceased beneficiary was the veteran's child, then VA will pay benefits to the veteran's surviving children who are entitled to death pension, death compensation, or dependency and indemnity compensation.

(2) *Surviving child who elected 38 U.S.C. chapter 35 educational benefits.* A surviving child who has elected dependents' educational assistance under 38 U.S.C. chapter 35 may receive benefits under paragraph (d)(1) of this section for periods prior to the commencement of benefits under chapter 35.

(3) *Deceased child's 38 U.S.C. chapter 18 benefits.* If a child claiming benefits under 38 U.S.C. chapter 18 dies on or after December 16, 2003, any accrued benefits resulting from such a claim are payable to the child's surviving parent(s). If there is no surviving parent, such accrued benefits are payable to the extent provided in paragraph (e) of this section.

(e) *No other eligible claimant survives.* If there are no eligible claimants under paragraphs (b) through (d) of this section, then VA will pay accrued benefits to the person who bore the expense of the deceased beneficiary's last sickness and/or burial, but only to the extent necessary to reimburse that person for such expense. VA will not pay accrued benefits due under this paragraph to any political subdivision of the United States, as defined in § 3.1(o)



of this chapter (for example, a State government). Benefits awarded, but unpaid at death, are not payable under this paragraph if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending before VA on December 16, 2003.

(f) *Effect of failure to claim benefits, or waiver of benefits, on rights of other claimants.* The fact that a claimant with a higher priority claim to benefits under the provisions of this section fails to file a timely claim for such benefits, or waives rights to such benefits, does not create a right to the benefits in a claimant with a lower priority. The fact that one or more claimants falling within the same category of claimants (children, for example) fails to file a timely claim for accrued benefits, or waives rights to such benefits, will not increase the amount payable to any other claimant in the category.

(Authority: 38 U.S.C. 501(a), 5121(a); Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

**§ 5.552 Claims for accrued benefits or benefits awarded, but unpaid at death.**

(a) *Scope.* This section applies to claims for accrued benefits. It also applies to claims for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending on December 16, 2003. It does not apply to claims for the proceeds of a benefit check the deceased beneficiary did not negotiate prior to death (see § 5.564, “Special rules when VA benefit checks have not been negotiated prior to the beneficiary’s death”), or for benefits under § 3.816 of this chapter, “Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.”

(b) *Time limit for filing—(1) Accrued benefits.* A claim for accrued benefits must be filed within one year after the date of the deceased beneficiary’s death.

(2) *Benefits awarded, but unpaid at death.* There is no time limit for filing a claim for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending before VA on December 16, 2003. Paragraph (b)(1) of this section applies where “accrued benefits” includes “benefits awarded, but unpaid at death.” See § 5.550(a)(2).

(c) *Other claims accepted as a claim for accrued benefits or benefits awarded, but unpaid at death.* A claim filed with VA by, or on behalf of, an apportionee, surviving spouse, child or parent for any of the following benefits will also be accepted as a claim for

accrued benefits and, if applicable, for benefits awarded, but unpaid at death:

- (1) Death pension,
- (2) Death compensation, or
- (3) Dependency and indemnity compensation. See also § 3.152(b) of this chapter.

(Authority: 38 U.S.C. 5101(b), 5121(c))

**§ 5.553 Notice of incomplete claims.**

If a claim for benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of persons eligible for benefits under the provisions of § 5.551, “Persons entitled to accrued benefits or benefits awarded, but unpaid at death,” or § 5.563, “Special rules when a beneficiary dies while receiving apportioned benefits,” and if the claimant may be entitled to payment of all or part of any benefits which may have accrued, then VA will notify the claimant:

- (a) Of the type of information required to complete the application;
- (b) That VA will take no further action on the claim unless VA receives the required information; and
- (c) That if VA does not receive the required information within one year of the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

(Authority: 38 U.S.C. 5121(c))

**§ 5.554 Evidence of school attendance in claims by a veteran’s children for accrued benefits or benefits awarded, but unpaid at death.**

(a) *Scope.* This section applies to claims for accrued benefits or benefits awarded, but unpaid at death, filed by or on behalf of a veteran’s child who has attained the age of 18, but is under the age of 23, who was pursuing a course of instruction at the time of the deceased beneficiary’s death.

(b) *Confirmation by school not required.* Subject to paragraph (c) of this section, school confirmation of evidence of school attendance is not required to support a claim described in paragraph (a) of this section.

(c) *Death of deceased beneficiary during school vacation period.* When the deceased beneficiary’s death occurred during a school vacation period, VA will consider the child to have been pursuing a course of instruction at the time of the death if school records show that the child was carried on the school rolls on the last day of the regular school term immediately preceding the date of the deceased beneficiary’s death.

(Authority: 38 U.S.C. 101(4)(A), 501(a))

**§ 5.555 What VA benefits are potentially payable as accrued benefits or benefits awarded, but unpaid at death?**

(a) *Scope.* This section lists which VA benefits potentially qualify, and which do not qualify, for payment as accrued benefits or benefits awarded, but unpaid at death.

(b) *Qualifying benefits.* (1) Clothing allowance under 38 U.S.C. 1162.

(2) Compensation, including death compensation under 38 U.S.C. chapter 11.

(3) Dependency and indemnity compensation under 38 U.S.C. chapter 13.

(4) Dependents’ educational assistance allowance or special restorative training allowance under 38 U.S.C. chapter 35.

(5) Medal of Honor special pension under 38 U.S.C. 1562.

(6) Monetary benefits for eligible children under 38 U.S.C. chapter 18.

(7) Pension, including death pension under 38 U.S.C. chapter 15.

(8) Restored Entitlement Program for Survivors (REPS) benefits (Pub. L. 97–377, § 156, 96 Stat. 1830, 1920–22 (1982)).

(9) Subsistence allowance under 38 U.S.C. chapter 31.

(10) Veterans’ educational assistance under 38 U.S.C. chapters 30, 32, or 34 and 10 U.S.C. 1606.

(c) *Non-qualifying benefits.* (1) Assistance in acquiring automobiles and adaptive equipment under 38 U.S.C. chapter 39.

(2) Assistance in acquiring specially adapted housing under 38 U.S.C. chapter 21.

(3) Insurance under 38 U.S.C. chapter 19.

(4) Naval pension under 10 U.S.C. 6160.

(5) Special allowance under 38 U.S.C. 1312(a).

(Authority: 38 U.S.C. 5121(a))

**§ 5.556 Period for which accrued benefits are paid.**

(a) *Two-year limitation.* If the deceased beneficiary died prior to December 16, 2003, VA may only pay accrued benefits for a period during the beneficiary’s life not to exceed 2 years. If benefits accrued for a period during the beneficiary’s life which was in excess of 2 years, VA will pay benefits for the period of 24 consecutive months that produces the highest payment to the accrued benefits claimant.

(b) *Exception to 2-year limitation.* See § 3.816 of this chapter, “Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.”

(Authority: 38 U.S.C. 5121(a); Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

**§ 5.557 Relationship between accrued benefits claim and claims filed by the deceased beneficiary.**

(a) *Claim for accrued benefits results from the deceased beneficiary's entitlement.* A claim for accrued benefits is a separate claim filed by a person eligible for such benefits under § 5.551, “Persons entitled to accrued benefits or benefits awarded, but unpaid at death.” However, the claimant's

entitlement is based on the deceased beneficiary's entitlement.

(b) *Accrued benefits claimant bound by existing decisions.* A claimant for accrued benefits is bound by any existing VA benefits decision(s) on claims by the deceased beneficiary concerning those benefits to the same extent that the deceased beneficiary was bound.

(Authority: 38 U.S.C. 501(a), 5101, 5121, 7104(b), 7105(c))

**§ 5.558 Special rule for certain cases involving deaths prior to December 16, 2003.**

If the deceased beneficiary died prior to December 16, 2003, but VA received a claim for benefits under 38 U.S.C. 5121 on or after that date, the claim will be adjudicated under the provisions of § 3.1000 of this chapter, and sections cited therein, in effect on December 16, 2003.

(Authority: 38 U.S.C. 5121; Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

**§ 5.559 Accrued benefits reference table.**

	Deceased beneficiary died prior to December 16, 2003		Deceased beneficiary died on or after December 16, 2003
	Claim pending on December 16, 2003	Claim received on or after December 16, 2003	
(a) Does the one-year time limit to file the claim apply?	(1) Yes for accrued benefits. <i>See</i> § 5.552(b)(1). (2) No for benefits awarded, but unpaid at death. <i>See</i> § 5.552(b)(2).	Yes for accrued benefits. <i>See</i> § 5.552(b)(1). In this situation “accrued benefits” includes benefits awarded, but unpaid at death. <i>See</i> §§ 5.550(a)(2)(ii), (iii), and 5.558.	Yes for accrued benefits. <i>See</i> § 5.552(b)(1). In this situation “accrued benefits” includes benefits awarded, but unpaid at death. <i>See</i> § 5.550(a)(2)(i).
(b) Does the two-year limitation on the benefit-payable period apply?	(1) Yes for accrued benefits. <i>See</i> § 5.556. (2) No for benefits awarded, but unpaid at death. <i>See</i> §§ 5.550(a)(3).	Yes for accrued benefits. <i>See</i> § 5.556 .. In this situation “accrued benefits” includes benefits awarded, but unpaid at death. <i>See</i> §§ 5.550(a)(2)(ii), (iii), and 5.558.	No. <i>See</i> § 5.556; sec. 104, Pub. L. 108–183, 117 Stat. 2656. This limitation does not apply if a deceased beneficiary died on or after December 16, 2003.
(c) Are accrued benefits and benefits awarded, but unpaid at death, potentially payable to beneficiaries described in § 5.551(b), (c), (d)(1), and (d)(2)?	Yes .....	Yes .....	Yes.
(d) Are accrued benefits and benefits awarded, but unpaid at death, potentially payable to beneficiaries described in § 5.551(d)(3)?	No .....	No .....	Yes.
(e) Are accrued benefits and benefits awarded, but unpaid at death, potentially payable to beneficiaries described in § 5.551(e)?	(1) Yes for accrued benefits ..... (2) No for benefits awarded, but unpaid at death. <i>See</i> § 5.551(e).	Yes for accrued benefits ..... In this situation “accrued benefits” includes benefits awarded, but unpaid at death. <i>See</i> §§ 5.550(a)(2)(ii), (iii), and 5.558.	Yes for accrued benefits, yes. <i>See</i> § 5.551(e). In this situation “accrued benefits” includes benefits awarded, but unpaid at death. <i>See</i> § 5.550(a)(2)(i).

(Authority: 38 U.S.C. 501(a), 5121; Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

**Death Compensation**

**§ 5.560 Eligibility criteria for payment of death compensation.**

(a) *Definition.* *Death compensation* means a monthly payment made by VA to a surviving spouse, child or children, or dependent parent or parents of a veteran because of the service-connected death of the veteran.

(b) *Basic eligibility.* Death compensation may be payable to a surviving spouse, child or children, or dependent parent or parents if the veteran died before January 1, 1957. If the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable.

(c) *Exception—certain Federal employees.* VA cannot pay death compensation to any surviving spouse, child, or parent based on the death of a commissioned officer of the Public Health Service, the Coast and Geodetic

Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration occurring on or after May 1, 1957, if any amounts are payable based on the same death under the Federal Employees' Group Life Insurance Act of 1954 (Pub. L. 598, 83d Cong., as amended).

(d) *Dependency of parents.* VA will apply the same rules for determining the dependency of parents for death compensation purposes that it uses to determine the dependency of parents for the purpose of awarding additional compensation to a veteran with a dependent parent. *See* § 3.250 of this chapter, “Dependency of parents; compensation.”

(Authority: 38 U.S.C. 101(13), 1121, 1141)

**§ 5.561 Time of marriage requirements for death compensation claims.**

(a) *Marriage before or during service.* A surviving spouse who married the veteran before or during the veteran's

military service meets the time of marriage requirements for death compensation. *See also* § 3.50(b) of this chapter (defining “surviving spouse”).

(b) *Marriage after service—laws in effect on December 31, 1957.* A surviving spouse who, with respect to time of marriage, could have qualified as a surviving spouse for death compensation under any law administered by VA in effect on December 31, 1957, meets the time of marriage requirement for death compensation.

(c) *Marriage after service—other means of qualification.* A surviving spouse who married the veteran after the veteran's discharge or release from military service meets the time of marriage requirements for death compensation if at least one of the following conditions is met:

(1) The marriage occurred within 15 years from the date of termination of the period of service in which the injury or disease causing the veteran's death was incurred or aggravated. Where the

surviving spouse has been married legally to the veteran more than once, the date of the original marriage will be used in determining whether this requirement has been met. For purposes of this section, "period of service" means a period of active military service, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking], from which the veteran was discharged under other than dishonorable conditions.

(2) The surviving spouse was married to the veteran for one year or more preceding the veteran's death. Multiple periods of marriage may be added together to meet the 1-year marriage requirement.

(3) A child was born of the marriage between the veteran and the veteran's surviving spouse or a child was born to them before the marriage. *See also* § 3.54(d) of this chapter (defining "child born of the marriage" and child "born \* \* \* before the marriage").

(Authority: 38 U.S.C. 101(2), 1102)

#### **§ 5.562 Eligibility criteria for special monthly death compensation.**

(a) *Basic eligibility.* A surviving spouse or surviving dependent parent in receipt of death compensation is eligible for special monthly compensation if he or she is helpless, or so nearly helpless, as to need the regular aid and attendance of another person. Except as provided in paragraph (b) of this section, VA considers the presence of factors listed in § 3.352(a) of this chapter when determining whether a person demonstrates this degree of helplessness.

(b) *Automatic consideration.* VA automatically considers an individual to be in need of regular aid and attendance, without having to demonstrate the degree of helplessness described in paragraph (a) of this section, if the individual:

(1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or has concentric contraction of the visual field to 5 degrees or less; or

(2) Is a patient in an approved nursing home because of mental or physical incapacity. *See* § 3.1(z) of this chapter (defining "nursing home").

(Authority: 38 U.S.C. 1122(b))

#### **Special Provisions**

##### **§ 5.563 Special rules when a beneficiary dies while receiving apportioned benefits.**

(a) *Person receiving apportioned share of veteran's benefits dies.* When a person receiving an apportioned share of a veteran's benefits dies, any unpaid benefits payable to that person will be

paid to the veteran, if living, or to surviving dependents of the deceased veteran in the priority specified in § 5.551(b).

(b) *Payment to person receiving apportionment when the veteran dies.* When a person is receiving an apportioned share of a veteran's benefits and the veteran dies, that person will be paid their apportioned share of those benefits for periods prior to the last day of the month before the veteran's death.

(c) *Payment of child's apportionment of surviving spouse's death benefits when the child dies.* If an apportioned share of a surviving spouse's death pension, death compensation, or dependency and indemnity compensation was payable for a child and the child dies, VA will pay any unpaid apportioned share to the person who bore the expense of the deceased child's last sickness and/or burial under the provisions of § 5.551(e).

(Authority: 38 U.S.C. 5112(b)(1), 5121(a), 5502(d))

##### **§ 5.564 Special rules when VA benefit checks have not been negotiated prior to the beneficiary's death.**

(a) *Death of a beneficiary—(1) Disposition of non-negotiated VA benefit checks'general rule.* Upon the death of a beneficiary, non-negotiated VA benefit checks should be returned to the issuing office and canceled. VA will pay the amount represented by the returned checks, or any amount recovered following improper negotiation of the checks, to the person or persons indicated in § 5.551(b) through (e), as applicable. The amount payable does not include any payment for the month in which the beneficiary died. *See* § 3.500(g) of this chapter.

(2) *Exception.* The rule in paragraph (a)(1) of this section requiring return of non-negotiated VA benefit checks upon the death of the beneficiary is subject to § 3.20(c)(2) of this chapter (permitting, under specific circumstances, a surviving spouse to negotiate a check for a veteran's compensation or pension for the month in which the veteran died).

(b) *No time limit.* There is no limit on the retroactive period for which payment of the amount represented by the checks may be made, and no time limit for filing a claim to obtain the proceeds of the checks or for furnishing evidence to perfect a claim.

(c) *Payment to a claimant having a lower order of precedence.* In the case where there was a survivor having a higher order of precedence, VA will make payment to a claimant having a lower order of precedence under § 5.551(b) through (e), as applicable, if it is shown that the person or persons

having a higher order of precedence are deceased at the time the claim is adjudicated.

(d) *Payment to estate.* Subject to the limitations in § 3.500(g) of this chapter, any amount not paid in the manner provided in paragraph (a) of this section will be paid to the estate of the deceased beneficiary, provided that the estate will not escheat (e.g., revert to a governmental entity).

(e) *Payment of amounts withheld during hospitalization.* The provisions of this section do not apply to checks for lump sums representing amounts withheld under § 3.551(b) of this chapter (concerning reduction of benefits when a veteran is hospitalized), or withheld prior to December 27, 2001, under former § 3.557 of this chapter (concerning reduction of benefits when an incompetent veteran is hospitalized). These amounts are subject to the provisions of § 3.1001 of this chapter, "Hospitalized competent veterans," and § 3.1007 of this chapter, "Hospitalized incompetent veterans."

(Authority: 38 U.S.C. 501(a), 5122)

##### **§ 5.565 Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.**

(a) *Purpose.* VA benefit payments may not be sent to a payee living in a foreign country if the Secretary of the Treasury determines that there is no reasonable assurance the payee will receive the benefit check or will be able to negotiate it for full value. Up to \$1,000.00 of such VA benefit payments may be deposited in an account entitled "Secretary of the Treasury, Proceeds of Withheld Foreign Checks" (special deposit account). This section provides information about who is entitled to the funds in that account when the payee dies, about claims for those funds, and about restrictions on payment.

(b) *Persons entitled to funds in special deposit account upon death of payee.*

When the payee of a check for pension or compensation dies, the deceased payee's funds in the special deposit account are payable as follows:

(1) If the deceased payee was the veteran, to the surviving spouse or, if there is no surviving spouse, to children of the veteran under 18 years of age at the time of the veteran's death.

(2) If the deceased payee was the veteran's surviving spouse, to children of the spouse under 18 years of age at the time of the spouse's death.

(3) If the deceased payee was the recipient of an apportioned share of the veteran's pension or compensation, to the veteran to the extent the special

deposit account consists of such apportionment payments.

(4) In any other case, to the person who bore the expense of the burial of the payee, but only to the extent necessary to reimburse that person for such expenses.

(c) *Time limit for filing claims and evidence.* (1) A claim for the funds in the special deposit account must be received by VA within one year after the date of the payee's death.

(2) The claimant must submit necessary evidence in support of the claim within six months after the date VA requests that evidence.

(d) *Other restrictions.* (1) Payment made under this section is limited to amounts due at the time of the payee's death under ratings or decisions existing at the time of the death.

(2) Payment will be made under this section only if both the deceased beneficiary and the claimant have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.

(Authority: 31 U.S.C. 3329, 3330; 38 U.S.C. 6104)

**§ 5.566 Special rules for payment of gratuitous VA benefits deposited in a personal funds of patients account when an incompetent veteran dies.**

(a) *Purpose.* This section provides rules relating to the disposition of certain funds on deposit in a personal funds of patients (PFOP) account for a veteran who was incompetent at the date of his or her death and who died after November 30, 1959.

(b) *Funds included.* The funds included are those on deposit in the PFOP account at the date of the veteran's death that were derived from gratuitous VA benefits deposited in the account by VA. See [regulation that will be published in a future Notice of Proposed Rulemaking] (defining "gratuitous VA benefits"). Funds derived from such deposits are those that resulted from the VA deposits, even though there may have been an intervening change in the form of the asset. For example, if amounts representing gratuitous VA benefits deposited by VA are withdrawn to purchase bonds on the veteran's behalf and redeposited upon the maturity of the bonds, an amount equal to the amount withdrawn for the purchase will be considered as derived from the deposits.

(c) *Funds excluded.* This section does not apply to the disposition of:

(1) Amounts resulting from funds deposited in the PFOP account by the veteran or others besides VA, regardless of the source of the deposit.

(2) Amounts, such as interest, representing an increase in the value of funds originally deposited by VA.

(d) *Eligible persons.* The funds described in paragraph (b) of this section will be paid to a person, or persons, living at the time of settlement (that is, when VA pays out the PFOP account) in the following priority:

(1) The veteran's surviving spouse, as defined in § 5.550(h).

(2) The veteran's surviving children, as defined in § 3.57 of this chapter, in equal shares, but without regard to their age or marital status.

(3) The veteran's parents, as defined in § 3.59 of this chapter, who are dependent within the meaning of § 3.250 of this chapter, in equal shares, or the surviving parent if only one is living.

(4) If no recipient listed in paragraphs (d)(1) through (3) of this section is living at the time of settlement, the person who bore the expense of the veteran's last sickness and/or burial, but only to the extent necessary to reimburse that person for such expense.

(e) *Claims for funds governed by this section—* (1) *Time limit for filing.* A person eligible for the funds governed by this section must file a claim for the funds with VA within 5 years after the death of the veteran. However, if any person otherwise entitled is under legal disability at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(2) *Submission of evidence.* There is no time limit for submitting evidence of entitlement to the funds governed by this section.

(3) *Effect of failure to claim funds, or waiver of claim, on rights of other claimants.* The fact that a claimant with a higher priority claim to the funds governed by this section fails to file a timely claim for such funds, or waives rights to such funds, does not create a right to the funds for a claimant with a lower priority. The fact that one or more claimants falling within the same category of claimants (children, for example) fails to file a timely claim for the funds governed by this section, or waives rights to such funds, will not increase the amount payable to any other claimant in the category.

(Authority: 38 U.S.C. 5502(d))

**Effective Dates**

**§ 5.567 Effective dates for DIC or death compensation awards.**

(a) *Death in Service—* (1) *Claim received within one year from date of initial report or finding of death.* (i) *General.* If VA receives a claim for

dependency and indemnity compensation (DIC) or death compensation within one year from the date the Secretary concerned makes an initial report of the veteran's actual death or finding of the veteran's presumed death in active military service, then benefits are payable from the first day of the month fixed by that Secretary as the month of death in the report or finding. See § 3.1(g) of this chapter (definition of "Secretary concerned") and [regulation that will be published in a future Notice of Proposed Rulemaking] (definition of "active military service").

(ii) *Exception.* Benefits are not payable under paragraph (a)(1)(i) of this section for any period for which the claimant received or was entitled to receive an allowance, allotment, or service pay of the veteran.

(2) *Claim received more than one year after date of initial report or finding of death.* If VA receives a claim for DIC or death compensation more than one year after the date of the initial report or finding of death described in paragraph (a)(1)(i) of this section, then benefits are payable from the date VA received the claim.

(b) *Service-connected death after separation from service—* (1) *Claim received within one year of death.* If VA receives a claim for DIC or death compensation within one year of the veteran's death, then benefits are payable from the first day of the month in which the veteran's death occurred.

(2) *Claim received more than one year after death.* If VA receives a claim for DIC or death compensation more than one year after the veteran's death, then benefits are payable from the date VA received the claim.

(c) *DIC elected in lieu of death compensation.* DIC is payable from the date VA receives the election of DIC in lieu of death compensation. See § 3.702 of this chapter (concerning election of DIC in lieu of death compensation).

(d) *DIC award to a child—* (1) *Claim received within one year from date entitlement arose.* If VA receives a claim for DIC within one year of the date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking], then benefits are payable from the first day of the month in which entitlement arose.

(2) *Claim received more than one year after date entitlement arose.* Except as otherwise provided in this part, if VA receives a claim for DIC more than one year after the date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking], then benefits are payable

from the date VA received the claim. See also § 3.403(a) of this chapter (concerning effective dates of awards to or for a child) and § 3.667 of this chapter (concerning effective dates of awards to certain children attending school after reaching 18 years of age).

(e) *Additional allowance for children.* Any additional allowance for children is payable beginning the date the surviving spouse's award is payable as provided in paragraphs (a), (b), or (c) of this section.

(Authority: 38 U.S.C. 5110(d)(1), (e)(1), (j))

**§ 5.568 Effective date for discontinuance of DIC or death compensation payments to a person no longer recognized as the veteran's surviving spouse.**

(a) *Purpose.* This section applies when VA is paying dependency and indemnity compensation (DIC) or death compensation to one person ("former payee") as a veteran's surviving spouse and another person ("new payee") establishes that he or she is the lawful surviving spouse entitled to those benefits. It provides the effective date for the termination of the payment of DIC or death compensation to the former payee. For information concerning the effective date of the award of DIC or death compensation to the new payee, see § 5.567, "Effective dates for DIC or death compensation awards."

(b) *Effective date for termination of payments to former payee.* For periods on or after December 1, 1962, DIC or death compensation payments to the former payee will be discontinued as follows:

(1) *Termination date of payments to the former payee if the award to the new payee is effective prior to the date VA received the new payee's claim.* Subject to paragraph (b)(3) of this section, if benefits are payable to the new payee from a date prior to the date VA received the new payee's claim, then the award to the former payee will be terminated the day preceding the effective date of the award to the new payee.

(2) *Termination date of the award to the former payee if the award to the new payee is effective the date VA received the new payee's claim.* Subject to paragraph (b)(3) of this section, if benefits are payable to the new payee from the date VA received the new payee's claim, then the award to the former payee will be terminated effective the date of receipt of the new payee's claim or the date of last payment to the former payee, whichever is later.

(3) *Exception if termination is due to a change in, or interpretation of, the law*

*or an administrative issue.* An award to the former payee will be terminated on the last day of the month following sixty days from the date of notice of the termination to the former payee at his or her last address of record, if payments to the former payee are terminated because of:

(i) A change in the law or an administrative issue; or

(ii) A change in the interpretation of the law or an administrative issue.

See also § 3.114(b) of this chapter.

(Authority: 38 U.S.C. 5110(a), 5112(a), (b)(6))

**§ 5.569 Effective date for award, or termination of award, of DIC or death compensation to a surviving spouse where DIC or death compensation payments to children are involved.**

(a) *Purpose.* This section provides effective date and payment adjustment rules applicable when:

(1) A surviving spouse becomes entitled to dependency and indemnity compensation (DIC) or death compensation when VA is already paying DIC or death compensation to the veteran's child or children, or

(2) A surviving spouse's award of DIC or death compensation is terminated and the veteran's child or children are entitled to DIC or death compensation upon termination of the spouse's DIC or death compensation.

(b) *Surviving spouse establishes entitlement—(1) Rate for child or children lower than rate for surviving spouse—(i) Effective date.* If a veteran's child or children received DIC or death compensation at a rate lower than the rate payable to the surviving spouse, the award of DIC or death compensation to the surviving spouse is effective the date provided by § 5.567, "Effective dates for DIC or death compensation awards."

(ii) *Rate payable to the surviving spouse.* The initial amount of DIC or death compensation payable to the surviving spouse is the difference between the rate paid to the child or children and the rate payable to the surviving spouse. The full rate is payable to the surviving spouse effective the day following the date of last payment to or on behalf of the child or children.

(2) *Rate for child or children same as or higher than the rate for surviving spouse.* If a veteran's child or children received DIC or death compensation at a rate the same as or higher than the rate payable to the surviving spouse, the award of DIC or death compensation to the surviving spouse is effective the day following the date of last payment to or on behalf of the child or children.

(c) *Surviving spouse receives DIC or death compensation after his or her*

*entitlement terminates and a veteran's child or children are entitled to DIC or death compensation—(1) Rate for child or children lower than rate for surviving spouse.* If a surviving spouse receives DIC or death compensation after his or her entitlement terminates and the veteran's child or children are entitled to a rate of DIC or death compensation lower than the rate paid to the surviving spouse, the award to the surviving spouse will be reduced to the rate payable to the child or children as if there were no surviving spouse. This reduced award is effective from the date the surviving spouse's entitlement terminated to the date of last payment to the surviving spouse. The award of DIC or death compensation to the child or children is effective the day following the date of last payment to the surviving spouse.

(2) *Rate for child or children higher than rate for surviving spouse.—(i) Effective date of termination of award to surviving spouse.* If a surviving spouse receives DIC or death compensation after his or her entitlement terminates and the veteran's child or children are entitled to rate higher than the rate paid to the surviving spouse, the termination of the award to the surviving spouse is effective the date of last payment to the surviving spouse.

(ii) *Effective date and rate for child or children.* The award to the veteran's child or children is effective the day following the date the surviving spouse's entitlement terminated. The initial amount is the difference between the rate payable to the child or children and the rate paid to the surviving spouse. The full rate is payable to or on behalf of the child or children effective the day following the date of last payment to the surviving spouse.

(3) *Rate for child or children same as rate for the surviving spouse.*

(i) *Effective date of termination of award to surviving spouse.* If a surviving spouse receives DIC or death compensation after his or her entitlement terminates and the veteran's child or children are entitled to the same rate as the rate paid to the surviving spouse, the termination of the award to the surviving spouse is effective the date of last payment to the surviving spouse.

(ii) *Effective date and rate for child or children.* The full rate is payable to or on behalf of the veteran's child or children effective the day following the date of last payment to the surviving spouse.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

**§ 5.570 Effective date for reduction in DIC “surviving spouses.”**

(a) *General.* If the circumstances described in this section require a reduction in an award of dependency and indemnity compensation (DIC) payable to a surviving spouse, VA will pay the reduced rate effective the day following the date of discontinuance of the greater benefit.

(b) *Marriage of child(ren) for whom a surviving spouse receives an additional allowance of DIC—(1) Marriage prior to October 1, 1982.* If a child married prior to October 1, 1982, VA will reduce the surviving spouse's DIC effective from the earlier of the following dates:

(i) The day preceding the child's 18th birthday; or

(ii) The last day of the calendar year in which the marriage occurred (see § 3.500(n)(2)(i) of this chapter).

(2) *Marriage on or after October 1, 1982.* If a child married on or after October 1, 1982, VA will reduce the surviving spouse's DIC effective from the earlier of the following dates:

(i) The day preceding the child's 18th birthday; or

(ii) The last day of the month in which the marriage occurred (see § 3.500(n)(2)(ii) of this chapter).

(c) *Recertification of pay grade.* If recertification of a veteran's military pay grade results in reduced DIC, VA will reduce the award effective the date of the last payment.

(Authority: 38 U.S.C. 501(a); 5112(b)(2), (10); 1311(a))

**§ 5.571 Effective date for an award or increased rate based on amended income information—parents' DIC.**

(a) *Expected income.* Subject to paragraph (c) of this section, if payments of parents' dependency and indemnity compensation (DIC) were not made or if payments were made at a reduced rate for a particular calendar year because of expected income, the effective date of any later award or increase for that calendar year based on amended income information will be the date entitlement arose, as defined in [regulation that will be published in a future Notice of Proposed Rulemaking], but not earlier than the beginning of that calendar year.

(b) *Actual income.* Subject to paragraph (c) of this section, if payments of parents' DIC were not made or if payments were made at a reduced rate for a particular calendar year because of actual income, the effective date of any award or increase for the next calendar year based on amended income information will be the beginning of the next calendar year.

(c) *Time limit.* The effective dates in paragraphs (a) and (b) of this section are subject to the applicable time limit for the submission of amended income information in [regulation that will be published in a future Notice of Proposed Rulemaking]. If VA does not receive the amended income information within the time specified in that section, benefits may not be authorized for any period prior to the date of receipt of a new claim.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

**§ 5.572 Effective dates for reduction or discontinuance based on increased income—parents' DIC.**

(a) *General.* If VA determines that a reduction or discontinuance of a running award of parents' dependency and indemnity compensation (DIC) is required because the parent's expected or actual income for a particular calendar year increased, VA will reduce or discontinue the award as provided in paragraphs (b) or (c) of this section, as applicable.

(b) *Effective date for reduction or discontinuance.* VA will reduce or discontinue the award effective the end of the month in which income increased.

(c) *Date of receipt or increase cannot be determined.* If the month in which income increased cannot be determined, VA will reduce or discontinue the award effective the beginning of the calendar year in which the income increased. If VA later receives evidence showing the month in which the income increased, VA will adjust the effective date accordingly.

(d) *Overpayments.* If an overpayment is created by retroactive discontinuance of benefits, the overpayment will be subject to recovery by VA if not waived. If DIC was being paid to two parents living together, the overpayment will be established on the award to each parent.

(Authority: 38 U.S.C. 501(a), 5112(b)(4))

[FR Doc. 04–21541 Filed 9–30–04; 8:45 am]

BILLING CODE 8320–01–P